Ten Things the Media Needs to Know About Bail

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Presented to Participants in
"Jailed Without Conviction? Pretrial Detention: The Clash between Due Process and Public Safety (What the Media Needs to Know)"
New Orleans, May 13-15, 2012

Introduction

I will not bore you with platitudes about the Fourth Estate and criminal justice. It has become clear to me that no special task force, no dedicated subcommittee, and no blue ribbon commission can have anything but a minimal impact on the justice system when compared to the press and other media. Media's ability set aside politics, self-promotion, and fear while focusing on the truth makes it potentially the preeminent force in shaping justice policy. Accordingly, I am encouraged to see the media becoming more interested in the topic of bail, which includes pretrial detention and release.

Bail is unique in criminal justice because no other topic illuminates injustice and irrationality (and now, hopefully, potential reform) on such a mass scale. A few years ago, I was in court watching the judge assigned to set bail, and a number of reporters had gathered near me to see a defendant charged with murder. When the judge ordered that particular defendant detained without bail, those reporters left. They took with them a simple narrative in which, seemingly, justice was done. But they missed the real story. The real story that day was that besides the alleged murderer who was denied bail, there were forty other defendants who were bailable on the condition that they pay arbitrary money amounts unrelated to their risk and set by a monetary bail bond schedule. The real story was that a high percentage of those bailable defendants who were lower risk ultimately could not pay the amount and were forced to stay in jail pretrial simply for lack of money (and in possible violation of the United States Constitution for lack of minimal procedural due process). Other bailable defendants, who were higher risk but who could pay the amount, left the jail (often with no supervision) only to commit more crimes in the community without forfeiting their bail bonds. The take-away story from that day in court should have been that our system of bail appeared unfair and illogical, and that the same thing was happening in courtrooms across America with millions of defendants each year.

Missing a story like this certainly was not the reporters' fault. After all, as a country we have been using arbitrary sums of money for bail and thus intentionally and unintentionally detaining defendants pretrial without scrutiny since before our founding. Criminal justice system actors have tolerated and participated in a flawed process, and have erected walls of custom, habit, and ignorance that have hindered recognition of those flaws. And the defendants? Well, it's not like they have lobbyists or anything.

To me, a story describing countless bailable defendants who cannot afford the financial conditions of their bail bonds raises one of *the* paradoxical criminal justice questions: that is, how can bail – a process designed over centuries to help defendants gain their release prior to trial – become so distorted that it actually hinders that release? I first raised that question in my jurisdiction in 2007, and

since then it has made slow but steady progress toward a more rational bail system. But I was not the first to raise it. In my later research, I learned that Judge Patricia Wald asked essentially the same question in 1964 on the eve of the first National Conference on Bail and Criminal Justice. So, really, countless people have been working on the answer to that pivotal question for a long time. And now, decades later, we have some pretty good solutions to the bail paradox.

In my opinion, however, before you can report on these solutions, you must obtain some level of substantive foundational knowledge about bail and pretrial detention and release. Therefore, I am exceedingly pleased that such important institutions as the Public Welfare Foundation and the John Jay Center on Media, Crime and Justice have organized a gathering designed to help cultivate that knowledge. Before I began looking into bail, I knew virtually nothing about it. Now, after five years of intense research (including working with reporters on some fairly high profile Colorado bail issues), I feel as though I have learned at least a few things that I can pass on. I am honored to be a part of this Conference, and in the spirit of its title, I humbly offer the following ten things that I believe the media needs to know about bail.

I. The History of Bail

Bail has a unique history, and knowing that history makes writing about bail significantly easier. When you know bail's history, you will have quick answers to commonly occurring questions, such as, (1) "How long has unnecessary pretrial detention been an issue?" (Answer – likely since the first crime was committed that didn't result in immediate punishment, but in modern bail history for at least 700 years, when the English Statute of Westminster addressed abuses in bail); (2) "Has the United States gone through any previous distinct periods of bail reform?" (Answer – yes, in the 1960s and in the 1980s); (3) "Are commercial bail bondsmen the norm?" (Answer – well, yes, but only in the United States and the Philippines – although four American states have completely eliminated the industry and other jurisdictions have drastically reduced their use of it; the rest of the world has rejected bail bonding for profit); (4) "Are there any best practice standards in bail?" (Answer – yes, starting in 1968, and they have been endorsed most recently by participants of the National Symposium on Pretrial Justice in 2011); and (5) "What has the United States Supreme Court said about pretrial detention?" (Answer – among other things, the Court has stated that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.)"

When you read the history of bail, you will see two distinct themes. First, bail has always been concerned with prediction. It was true in the period of Anglo-Saxon England, when officials tried to predict whether an accused would be judged guilty, and it is still true today, when officials use sophisticated statistical tools to predict a defendant's risk for failing to appear for court and to public safety during his or her release. Second, until the 1980s, every historically significant bail reform came as a result of abuses leading to unnecessary pretrial detention. Reform in the 1980s focused on recognizing public safety as a valid constitutional purpose for limiting pretrial freedom, but that was a monumental shift from the pattern of protecting individual liberty against abuses leading to unnecessary incarceration. Today's reform efforts both here and abroad are again focusing on reducing unnecessary pretrial detention, this time by promoting legal and evidence-based best practices, which rarely, if ever, include the use of money. In the most recent history of bail, numerous national criminal justice organizations have released statements supporting risk assessment, appropriate supervision, and rational and transparent detention procedures, but not the use of money.

To learn about bail's history, you can read thousands of pages in the documents that I have read, or can start with the 27 page document that I co-authored with Mike Jones and Claire Brooker in an

attempt to synthesize that information for our jurisdiction. It is called *The History of Bail and Pretrial Release*, and it is available through the Pretrial Justice Institute website (www.pretrial.org).

II. Bail Laws

Bail laws are the boundaries that must be kept in mind as various practices (or even the laws themselves) are being discussed or possibly changed. For example, if a state is considering changes to its preventive detention statute, it is important to know what the state and federal constitutions, state and federal case law, and various state statutes and rules already say about the right to bail. As a second example, if a court has decided to have weekend advisements, it must know the various laws implicated by that change, such as victim's rights laws or rules concerning whether prosecutors must be present. As a more concrete example, when Colorado was recently considering legislation creating a so-called "deposit bond option," certain persons needed to know why such a law was necessary (a little-known court opinion forbade the option under existing law), which other states had similar language, and whether it was legal as drafted.

I wish that learning the relevant bail laws was easy, but it definitely is not. Every state has different bail laws, and the federal law may or may not apply to your particular issue. Nevertheless, you should find comfort in knowing that someone in your state undoubtedly has the relevant knowledge to help you with covering any particular story. The key is finding that person. You may be tempted to ask persons who actively participate in bail settings – i.e., judges, attorneys, etc., but do not be surprised if they have not even read their own bail statute. Often your best source on why a particular release decision was made will be the judge, but judges are rightfully reluctant to speak about their reasons away from the bench. Finally, watch out for politicians. If you want to know the law for a particular story, you should not have to wade through any political slant. My advice for you is to ask one or two local law professors. If they do not know the various bail laws, they can certainly research and learn them to act as your unbiased source.

Virtually all substantive bail laws represent attempts to strike the balance between our individual constitutional rights and the government's interest in protecting the public and assuring court appearances. Knowledge of this balance is critical to reporting about bail. When someone complains about a particular release type or some bail bond condition (especially money) having an impact on public safety or court appearance without talking about constitutional rights, that person has left out an entire side of the equation.

III. Pretrial Research and Science

Bail has a fairly long history of empirical research. Since the 1920s, scholars have studied bail and its variables in a variety of contexts. Current scientific research in the field of bail and pretrial release and detention is exciting and rapidly expanding, and it can add crucial context to any particular story. The research can be quantitative or qualitative, somewhat technical or somewhat loose. In Jefferson County, Colorado, we were asked to research what would happen if the judges made a conscious decision to set bail by more closely following the national best practice standards, and our findings changed the way bail is administered in that County. In another research project, Colorado recently developed its first validated pretrial risk assessment instrument, building on statistical research from other jurisdictions such as Virginia, Ohio, Kentucky, and the federal system. In a world anxious to use evidence-based practices to be "smart on crime," pretrial empiricism provides guidance by telling you what does and does not work.

Two years ago the for-profit bail industry proposed a Colorado ballot initiative designed to force judges to order secured bonds (i.e., with up-front money required for release) on virtually all defendants. The bail agents and the insurance companies that profit from them said that such a requirement would promote public safety. Opponents (everyone else in the criminal justice system) said that the measure was a self-serving attempt to add to the commercial bail industry's profits. What did the research say? The research demonstrated that no amount of money would prevent or deter a released defendant from breaking the law. Moreover, Colorado law permitted a court to forfeit a bond only for non-appearance, meaning that amounts of money also were not even legally tied to public safety (i.e., if a new crime was committed while released on bond, the defendant would not have to pay any money to the court as a result; money would only be payable if the defendant failed to appear for court). The best national and local research on money at bail showed that money did only one thing: it kept defendants in jail. That research prompted the Colorado Legislative Council (the state's unbiased entity charged with summarizing ballot initiatives) to say that the proposed bill would cost the state millions of dollars per year in jail bed days due the likelihood of increased pretrial detention.

In addition to this week's conference participants explaining various empirical data, there are many other persons you can contact to ask whether a particular practice has supporting evidence, including participants from the National Symposium on Pretrial Justice such as Marie VanNostrand, John Goldkamp, and Christopher Lowenkamp, as well as individuals associated with the Pretrial Justice Institute (PJI) in Washington DC. The PJI website also has links to important documents explaining the science behind various practices such as, for example, risk instruments or pretrial supervision techniques.

IV. Terms and Phrases

The media needs to know that certain terms and phrases have meanings that are unique to bail, and that often people use those words and phrases incorrectly or differently from how others use them. The fact that people equate the term "bail" with amounts of money provides my best example. I recently heard someone say, "The sole purpose of bail is to get the defendant back to court." Having read about the history of bail, I knew that for roughly 1,500 years of modern bail history the sole purpose of placing conditions on a defendant's pretrial liberty was, indeed, to get him or her to return to court. However, I also knew that in the 1970s and 1980s, various jurisdictions began expanding bail's purpose to include concerns for public safety, and that in 1987 the United States Supreme Court expressly allowed restrictions on pretrial liberty to protect community safety. Today, in virtually every jurisdiction (New York being a notable exception) you can say that the process of bail can be premised on two constitutionally valid purposes – getting a defendant back to court and protecting the public. So why did this person, a lawyer, say that the sole purpose of bail was only court appearance? It turns out that this person defined bail as an amount of money. Because money has only ever been correctly used to assure the presence of the accused (though its usefulness is now questionable), he was really saying that "the sole purpose of money is to get the defendant back to court." In that sense he was technically right, but the statement without context was incredibly misleading.

Based on the law and its entire history, bail is more appropriately defined as a process of release (the United States Supreme Court has equated the "right to bail" with "the right to release before trial" and the "right to freedom before conviction") with lawful conditions designed to further the valid constitutional purposes of bail. There is "bail" (a process of release with conditions) and there is "no bail" (a process of detention), and these concepts are mostly spelled out in the various state constitutional provisions, but sometimes in state statutes or court rules. Money is not bail. Money is a financial condition of a bail bond. I say this with the knowledge that certain state statutes, such as Colorado's, define bail as an amount of money. In my opinion, statutes like this should be changed.

You should be wary of the fact that very reputable sources may define terms and phrases in ways that do not reflect reality. To help people better discern meaning, I co-authored a *Glossary of Terms and Phrases Relating to Bail and the Pretrial Release or Detention Decision,* which is available on the PJI website. It includes definitions for certain troublesome phrases, such as "presumption of innocence," as well as key court cases and well known events.

V. The Third Generation of Bail Reform

The media should know that we are beginning a third generation of American bail reform. In 1993, Dr. John Goldkamp, the esteemed researcher from Temple University, correctly noted that the United States had completed two generations of bail reform since the country's inception. The first, in the 1960s, used the pioneering work of the Vera Foundation's Manhattan Bail Project to encourage using the least restrictive, non-financial conditions of release, as well as presumptions favoring release on recognizance based on information gathered concerning the defendant's community ties to help assure court appearance. The second, in the 1980s, focused on the need to assess the risk to public safety as a constitutionally permissible purpose of bail. Both generations resulted in radical departures from the way bail had been administered previously, and both resulted in changes in federal and state statutes, and sometimes in state constitutions. Today, justice systems across the country are beginning what many hope will be a final attempt to correct specific obstacles to pretrial justice, which endeavors to bring meaning to the presumption of innocence and other core constitutional rights and principles triggered by an arrest. In my opinion, this is the beginning of the third generation of bail reform.

This generation, which aims primarily to reduce the deleterious effects of money at bail and to focus more on transparent and rational processes, such as assessment and supervision to address a particular defendant's pretrial risk, finds its genesis from a number of interrelated factors. First, over the last ninety years, a body of research literature has been amassed to a point where both criminal justice professionals and ordinary citizens feel less comfortable with bail's status quo and more comfortable with change. For several decades this research has pointed in a single direction, a direction that has been documented, embraced, and/or standardized by multiple national organizations. Second, much of that research continues to demonstrate that current bail practice is deficient. Many states are still deeply ingrained in the traditional "money bail" system. That system, which focuses on setting often arbitrary amounts of money in the hope of reducing pretrial risk, represents the antithesis of the type of system contemplated by both the research in the field and the national best-practice standards. In short, the traditional money bail system is one that is over-reliant on money. Some of its hallmarks include monetary bail bond schedules, overuse of secured bonds, a reliance on for-profit bail bondsmen, financial conditions set to protect the public from future criminal conduct, and financial conditions set without consideration of the defendant's ability to pay or without consideration of non-financial conditions that would likely reduce risk. There are numerous deficiencies with the traditional money bail system, but the two most frequently cited are that: (1) it allows higher-risk, sometimes very dangerous defendants to buy their way out of jail; and (2) it keeps lower-risk but poor defendants in jail, even though community supervision would reasonably manage any perceived risk at a fraction of the jail's costs. The traditional money bail system is deficient legally, economically, and socially, and virtually every neutral and objective bail study conducted over the past ninety years has called for its reform.

Third, people's attitudes about crime and incarceration are changing. In 2002, Peter D. Hart Research Associates reported a "fundamentally different perspective" when assessing public opinion about crime and criminal justice, with most people polled endorsing more "balanced" and "multifaceted" solutions like crime prevention and rehabilitation, versus traditional "tough on crime" solutions that

focus on punitive approaches such as increased incarceration. In 2009, a Zogby International poll found that 77% of respondents believe alternatives to incarceration do not decrease public safety, and more than half of those polled believed that those alternatives ultimately decrease costs to state and local governments. According to the National Institute of Corrections, that poll "reflects the public's current expectation that, among others, the current rate of offender failure is unacceptable; spending should be increased on approaches proven to reduce crime; and criminal justice professionals should rely on research in their decision making."

The fourth interrelated factor sparking the current generation of bail reform is related to budgets. As local governments have been charged with providing more essential services with less money, justice systems have searched for strategies to reduce costs without sacrificing public safety. Many of these systems have looked to the area of pretrial release and found, based on the literature mentioned above, that they could adopt proven, research-based practices that could also save money. As those local systems showed some measure of success, other jurisdictions, even those without budget issues, became more comfortable with change.

VI. Enemies of Bail Reform

Virtually all criminal justice system change invites opposition. But rarely will you experience the inexplicably virulent opposition caused by changes in the administration of bail. The third generation of bail reform, as it is currently defined, has in recent years brought about nothing less than a war over pretrial practices being waged in nearly every state. In my work in bail, I have seen judges, prosecutors, defense attorneys, police, victim's representatives, and other system actors express doubt and concern over one or more elements of change. Sometimes those concerns are unfounded, and sometimes they are not. And sometimes the actors become passionately vocal despite reason. But the award for consistently forceful opposition due to a single agenda goes to the commercial surety industry, which includes bail agents and the insurance companies that profit from them. If bail reform means using legal and evidence-based practices, and if there exists little evidence for using money at bail and mounting evidence for avoiding it and its ill effects, then the commercial surety industry will undoubtedly be bail reform's biggest enemy.

You can blame neither the bail agents nor the insurance companies for their stance. Despite their somewhat sullied reputation, and although I see significant flaws in practical aspects of the commercial bail bond system, bail agents are typically small business owners and good people, passionate about the right to bail and rightfully concerned that their industry is being made obsolete. And who can blame the bail insurance companies? These are the underwriting companies for the bail bonding agents, and they exist only to make a profit. Indeed, I have heard it said that maximizing profit is the only social obligation of business, and to the extent that a particular bail insurance company is incorporated, its officers and directors have a fiduciary *duty* to protect the financial interests of that company. Thus, fighting against what virtually every other criminal justice entity sees as bail reform in order to continue making money is really not their fault. If anything, it is the criminal justice actors' fault for using deficient practices to begin with. As long as judges set unattainable secured financial conditions on bail bonds, there exists a need for some third party to help defendants pay. When that third party is a commercial bail agent, he or she charges for the service. And when that bail agent gets paid, an insurance company will typically get a cut. It is a highly profitable business (think about it – if you can just get a judge to simply say $10,000 instead of $5,000, the profits have doubled), and the insurance companies do not want to see it go.

Nevertheless, the commercial bail industry's primary focus on profit in an area that demands consideration of higher values can create a toxic environment, with misplaced goals and slight regard to justice. In a story about unpaid bond forfeitures aired recently on Denver's Channel 9 News, a bail recovery agent was quoted as saying that his primary allegiance was not to the courts or the justice system, but to the insurance company. Accordingly, he said, "My job is to protect the insurance company from the loss. If you can financially get off a bond, and it's a sound business decision to do so, then anybody in their reasonable mind would do so. It's not a greed thing, we just don't want to pay. And if we don't have to pay, then we win that one . . . [t]he system loses." I have also worked in area of crime prevention, and I am waiting for the day that the commercial surety industry opposes that, too.

But my fundamental point in this section is to emphasize that when the media reports about bail, it needs to know who its sources are. During a fight over a particular piece of bail legislation, for example, the media might want to interview persons in the criminal justice system (such as judges, police, or prosecutors) and also a bail bondsman, but it is probable that the bondsmen had little to do with the bill. Instead, a bail insurance company likely drafted the legislation, paid for the research to support it, hired lobbyists to see it get passed into law, and even told the bondsman what to say to the media. The insurance companies belong to coalitions responsible for most pro-money bail legislation in this country, and they use their considerable resources (they have the means to fund entire local campaigns) to fight the money bail opposition. Be particularly wary of any information coming from an entity called the American Legislative Exchange Council (ALEC). Take a look at the website http://alecexposed.org/wiki/ALEC_Exposed or just search the terms "ALEC" and "Joe Camel," "ALEC" and "private prisons," "ALEC" and "prison labor," "ALEC" and "illegal immigration," or, most recently, "ALEC" and "stand your ground law" to get a feel for its work. The bail insurance industry is a primary participant in the world of ALEC.

Here is my short and simple history of the "war" surrounding bail reform. For centuries, money and bail (a process of release) were inextricably intertwined with money being used as the sole means to get persons back to court. In America, money bail amounts rose to the point where defendants could no longer pay the largely arbitrary sums, and jails were becoming increasingly crowded. The first third-party bail bonding company began in the 1890s, and despite a general growing dissatisfaction with the industry (indeed, some states ultimately abolished it), bail bonding for profit flourished for the next 100 years. Even so, bail bondsmen and women only helped those defendants who could afford to pay the fees, and so jail pretrial populations continued to swell and jurisdictions looked for alternatives to cure the inequities of money bail. One of those alternatives was release on a defendant's own recognizance (OR), a practice that proved effective and that spread across the country. Because no up-front money was involved with this practice, pretrial services agencies were created not only to assess defendants' eligibility for release, but also to help "supervise" defendants released on OR. In the old days, own recognizance release meant no financial conditions, period. Now you will frequently see "own" or "personal" recognizance (PR) bonds with unsecured financial conditions that are payable only if the defendant does not show up for court. Indeed, a typical OR or PR bond with various non-financial conditions and an unsecured financial condition is distinguishable from other bond types only by when the amount of money must be paid. But remember that when that amount must be paid up-front, some number of defendants will inevitably end up unnecessarily detained.

Until the 1970s and 1980s, court appearance was the only constitutionally valid purpose for restricting a defendant's pretrial liberty, but over time even this foundational pillar of bail law changed. In 1987, the United States Supreme Court acknowledged public safety as a valid constitutional purpose for restricting pretrial liberty, and various non-financial conditions of bail (such as drug and alcohol testing, GPS monitoring), grew in popularity to help provide courts with reasonable assurance of public safety.

It was precisely at this point that the commercial bail industry failed to evolve. It continued to work only with money and to promise only to help bring defendants back to court. Bail agents would not supervise a defendant for public safety, and they would not be held accountable for lapses in public safety while a defendant was on bail. In states across the country, bail agents were assured that the only way they could lose any money was if the defendant did not show up for court. So long as the defendant came to court, a new crime simply provided bail agents and insurance companies with another business opportunity.

This left an obvious gap in supervision of defendants for purposes of public safety, and the existing pretrial services agencies evolved to close that gap by agreeing to monitor defendants to assure that the non-financial conditions were met. Now if a judge ordered, say, drug testing to help protect the public, someone would make sure that those tests were carried out. Pretrial agencies were assessing and supervising defendants keeping in mind both constitutionally valid purposes of bail – court appearance and public safety – and consequently judges grew more reliant on them. This pretrial services agency adaptation, along with a growing realization that money was hindering many defendants' release on bail, led many judges to use less money and more unsecured bail bonds with supervision by pretrial services entities.

The commercial surety industry, which had become quite powerful, began to forcefully oppose these trends. Beginning in the 1990s, bail agents and the insurance companies that profit from them launched attacks against pretrial services agencies, introduced bills to limit pretrial services entities and to mandate secured or even surety bonds (some even with minimum dollar amounts to assure a minimum profit), and waged political battles against elected officials who opposed their efforts. The for-profit bail bond industry has always been on the offensive, faithfully looking for ways to increase its profit in the criminal justice system; indeed, it has recently begun advocating for post-conviction and sentence "bail" for early prison releases. Lately, however, the industry has seemingly been somewhat on the defensive due to the mounting body of research linking money to unnecessary pretrial detention.

In addition to encountering misleading sources, I have found that you cannot always trust the accuracy of information flowing in the war. Here, more than in other areas in criminal justice, reporters should verify the substantive content of whatever study they are reading.

VII. Criminal Justice Leaders

Bail and pretrial detention issues are arcane and often counterintuitive, and so even those people who appear highly qualified to talk about bail may not provide the media with accurate information. Bail is a subject that requires the media to cultivate multiple experts to accurately report a story. Do not be

surprised if criminal justice leaders misstate the law or do not fully understand the rationale behind their own practices.

VIII. The Aberrational Misconduct Case and Criminal Justice Perspective

One tendency in reporting about bail is to write about aberrational misconduct cases, which are cases that do not reflect the norm. You will hear about these cases from both sides of any bail debate. One side will want you to report on a defendant who was released on a commercial surety bond and killed someone, so as to focus on the flaws of the commercial bail bond industry. The other side may want you to report on some person who did the same thing but was released under pretrial services supervision, so as to focus on the flaws of that particular release-type. Realize that both cases are perhaps newsworthy, but aberrational. Single, aberrational cases published in the media without context are often no better than anecdotes in gradations of evidence, but their power to mislead, generate unwarranted fear, and force unnecessary and often undesirable changes to laws or polices is undeniable. Thus, the media should know that it is advisable to offer perspective for any particular story about bail.

Always ask if the particular case is indicative of the aggregate of cases, and if it is not, whether it still illustrates some flaw that must be addressed or rectified. In the aggregate, most people do not commit new crimes while on bail, and yet people occasionally commit heinous crimes under all forms of supervision (including prison). In the aggregate, most people show up for court, and yet occasionally some high-profile person will skip court just as hundreds might skip every day in traffic court. In the aggregate, virtually everyone in our jails will ultimately be released back into our communities and can be supervised pretrial within our communities, and yet occasionally courts will see truly dangerous individuals who must be detained. The right to bail necessarily means that society will encounter some pretrial misconduct. It is one of the costs of freedom.

IX. Focusing on the Amount

Another tendency in reporting about bail is to focus only on the amount of money – what the pretrial field calls the amount of the financial condition of a bail bond. The media needs to know that the future of bail involves moving away from dollar amounts as sole indicators of public safety or any one court's assessment of the seriousness of a particular crime. Courts across America are realizing that the largely arbitrary amounts of money at bail have no effect on public safety when the defendant is released, and little if no added benefit on court appearance rates when other non-financial conditions are put in place. Accordingly, it is not unusual in the third generation of bail reform to see courts setting multiple own-recognizance or personal recognizance bonds (with or without *unsecured* financial conditions, i.e., money paid on the back-end only if a defendant fails to appear) or bonds with financial conditions that are $100 or less for crimes that in the past had tens of thousands or hundreds of thousands of dollars attached to them.[1] In doing so, these courts are actually following the research as well as legal and evidence-based best practices and national standards, which state that money

[1] Unfortunately, I have also been seeing more and more bail bonds with millions of dollars affixed as financial conditions. In my opinion, in most cases these financial conditions are designed to detain defendants in "right to bail" states with narrow preventive detention statutes. Such an intention (and perhaps even the amount itself) raises constitutional questions depending on the context in which the bond was set.

should never be used to protect the public (because it does not) and only as a last resort to assure court appearance *when no other condition or combination of conditions will suffice.*

In the past, a typical crime story might end with a line like, "The defendant was released on $50,000 bail." Today, a more accurate line might be, "The defendant was released on bail, subject to numerous conditions that will be closely supervised by the court to assure that he comes back to court and stays out of trouble while he awaits trial." The fact that the media currently focuses on money is not the media's fault. The truth is that the criminal justice system does the same thing. Even though a court might place numerous non-financial conditions on a defendant's bail bond, the court might still call it a $500 cash bond as a sort-of shorthand method of describing it. Nevertheless, the media should know how to describe a bail bond accurately.

Due to our unhealthy focus on the amount, society tends to look at the financial condition of a bail bond as a quick assessment of the criminal justice system's feelings about the seriousness of the alleged crime. Unfortunately, a perception of seriousness is not, by itself, a constitutionally valid purpose for restricting a defendant's liberty. To be constitutional in virtually every state, seriousness must be incorporated into an inquiry of the risk to court appearance and public safety. To fully understand this concept, the media (and thus the public) must realize that it is possible for an alleged murderer to pose neither risk, but an alleged petty thief to pose both. Setting a financial condition based only on the alleged crime implicates setting bail as punishment, which is clearly invalid.

A local Colorado court once received negative newspaper reports when it set a "low" cash bond for a particular defendant charged with a crime that the prosecutor felt deserved a higher amount to better protect the public. The court said nothing in response, which was unfortunate (yet predictable, as courts are reluctant to do so) because the media's focus, following the prosecutor's lead, was on the amount of money and how it affected public safety. In hindsight, the court should have issued a statement such as the following, which could be adapted and used in numerous states besides Colorado:

> With few exceptions, our State Constitution provides defendants with a right to bail, or freedom prior to conviction, with conditions (both financial and non-financial) designed to provide reasonable assurance of court appearance and public safety. Research over the last 90 years has never shown that any amount of money prevents or deters a released defendant from breaking the law. Moreover, the laws of this state permit a court to forfeit a bond only for non-appearance, meaning that amounts of money also are not legally tied to public safety. Accordingly, courts in this state primarily use numerous non-financial conditions of release to provide reasonable assurance of public safety during the pretrial period. Money, if used at all, is only properly used when *no* other condition or combination of conditions provide reasonable assurance to the court that the defendant will appear. This is the role of money as articulated by the American Bar Association's best practice standards on pretrial release, which our Supreme Court has indicated were used as a basis for many of the revisions to our bail laws in prior decades.
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> In this particular case, the defendant was released with express court orders to appear for court and not to violate any other laws or his bail bond would be revoked and he would face possible additional criminal penalties as described in our statutes. In addition, he was released on the following non-financial conditions designed to help provide the court with further assurance of public safety: (1) the defendant was ordered not to consume drugs or alcohol, and to submit to random drug and alcohol testing to be administered at least weekly; (2) the defendant was ordered to comply with the mandatory statutory protection order as well as an additional no-contact order to stay a minimum distance from the alleged victim and others in the case; (3) the defendant was ordered not to drive a vehicle without a valid license during the pendency of his case; and (4) the defendant was ordered to submit to and pay for active global positioning system (GPS) monitoring.

> Additionally, the defendant was released only on the condition that he would be supervised by the County's Pretrial Services Program. That Program is designed to help defendants adhere to all of the non-financial conditions placed upon them that are designed to protect public safety. Moreover, that Program has in place effective procedures, such as telephone reminder systems and other contact techniques, designed to get defendants back to court. Currently, defendants on pretrial services supervision in this County show up for their court dates 98% of the time. At the time that this defendant was assessed for his risk for non-appearance, the Court did not believe that he was likely to fall into the 2% of cases where there would be no appearance for court while on pretrial services supervision.
>
> In any particular case, this Court must balance a defendant's right to bail and other constitutional rights with his or her risk to public safety and risk for failure to appear for court by following the numerous statutory factors outlined in the bail statute designed to individualize bail bond determinations. In considering those factors, the Court in this case believed that the defendant could be adequately supervised in the community during his trial through this combination of non-financial conditions of release, and that the effectiveness of the Pretrial Services Program would suffice to help the defendant make his court dates. For the same reasons, the Court believed that the amount of bond in this case was a reasonable amount.

I again emphasize a particularly important point that this statement makes, which is indicative of bail laws across America: money at bail does not protect the public, and money on a bail bond will almost never be lost unless a defendant does not show up for court. In Colorado (as in other states) a defendant can be released on a $1 million bail bond, and even if he goes out and kills someone, neither he, nor the bail agent, nor the insurance company will forfeit the money so long as he continues to come to court.

X. Covering Both Sides of a Conflict

I have heard it said that talking to parties representing both sides of a conflict is one of the golden rules of journalism. I agree, but with the caveat that in bail there may be twenty parties with varying viewpoints about any particular conflict. Sometimes, the conflict is 19 to 1, with the one having the loudest voice or the most money. Other times, it is a more delicate balance. The media will have to decide which viewpoints to report and which to present with extensive perspective so as not to mislead the audience.

Conclusion

Once somewhat overlooked, bail is now at the center of a global movement toward pretrial justice. The issues are complex but entirely knowable. And when you know the issues, the stories about bail will appear seemingly limitless and almost always epic, with each providing a slice of human drama set against the overarching, sometimes painful process of gradual change to a major part of the American justice system. The world is waiting for these stories. It is waiting for people, such as you in the media, to take the time to learn the issues and to make them easy to understand.

In the movie Charlie Wilson's War, after countless attempts to find people on the Hill who would support the Afghans' struggle to repel the Soviet army during the Cold War, Philip Seymour Hoffman asks Tom Hanks somewhat incredulously whether it was possible that he (Hoffman) had just met the one person in town that could actually help. That is essentially my question for each of you here today. I ask you, "As you learn more about bail, will you be the one who will apply this knowledge, who will look beyond politics and self-interest to present the stories truthfully, accurately, and objectively to the American people?" I sincerely hope that you will.