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An Overview of the Bail System in the United States and its Discriminatory Components

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Abstract

Currently, in the United States, the bail system is not being utilized the way that it was originally intended to be used. Research shows that it unfairly provides wealthier individuals more opportunities for success and those who are minorities and/or of low socioeconomic status are more likely to be convicted and face harsher sentences. While minority groups face discrimination within the bail system, Hispanic/Latino individuals face the most challenges regarding the bail system in America. The following paper will provide a historical overview of bail to provide context of how much the system has changed and evolved since the origins of America.. Consequences of bail decisions on jail populations, the effects of race/ethnicity on pretrial incarceration, and the effects of not being able to pay bail will also be discussed, followed by policy implications for how America can improve policies and procedures regarding the bail system to help prevent discrimination from occurring.

An Overview of the Bail System in the United States and its Discriminatory Components

The concept of bail has been the subject of much controversy for many decades. Bail is defined as a type of security provided to ensure that the accused appears at every court proceeding throughout the process (Turner & Johnson, 2005). Bail can be in the form of cash, collateral, personal recognizance, the help of a bail bondsman, or the threat of having to pay a large amount of money if defendants do not appear at all of the court proceedings (Williams, 2016). The Eighth Amendment of the Constitution of the United States protects against excessive bail amounts being imposed on citizens but does not guarantee that the price of the bail will be an amount that everyone can afford (Starger & Bullock, 2018).

While the original concept of bail was enacted in order to help all individuals accused of committing a criminal offense, throughout the years, it has turned into something that hurts many people. Multiple research studies have found that those who cannot make bail and therefore stay incarcerated before their trial tend to plead guilty more often, have higher rates of conviction, and experience much harsher sentences than those who can afford to pay bail (Donnelly & Macdonald, 2018; Heaton, Mayson, & Stevenson, 2017; Walker, Spohn, & DeLone, 2018). Those who are African American and Hispanic/Latino, for example, are severely negatively affected by the bail system in the United States (Walker et al., 2018).

The bail system appears to be inherently biased against lower class individuals. Bail amounts are often extremely high, and defendants who are poor oftentimes cannot afford to pay their bail, which means that they must stay in jail until their court dates arrive (Alexander, 2012; Heaton et al., 2017). While defendants are incarcerated, it is difficult to conduct research and contact individuals involved in their respective cases, meaning that it is nearly impossible to

even try to help one's attorney from a jail cell. As the public defender system is so backlogged and the attorneys are incredibly overworked as it is, defense attorneys often do not get the chance to know much about the defendants' cases that they are trying (Alexander, 2012; Walker et al., 2018). Thus, defendants who can afford to pay their bail amounts have an advantage to those who cannot because wealthier defendants have more time and resources to meet with attorneys, conduct their own research, talk to those involved with the case, all on their own time. Defendants who cannot afford to pay their bail do not have this luxury, as they remain incarcerated until their trial (Alexander, 2012; Walker et al., 2018). Research indicates that both African American and Hispanic defendants who remain incarcerated prior to their trial because they cannot afford to post bail are more likely to be convicted, as well as receive harsher sentences than individuals who can afford their bail (Alexander, 2012; Sacks, Sainato, & Ackerman, 2015; Walker et al., 2018).

When examining the criminal justice system, it is clear that there are significant problems with the current bail system in the United States. The bail system is causing poor individuals and minorities to be incarcerated for longer periods of time and therefore causing them to be more likely to be convicted simply because they cannot afford to pay their bail (Alexander, 2012; Heaton et al., 2017; Raphling, 2018; Sacks et al., 2015; Schlesinger, 2005; Turner & Johnson, 2005; Walker et al., 2018; Williams, 2016). Reforms need to be made to this system in order to fix the inherently discriminatory nature of the process. The purpose of this paper is to provide an analysis of how the bail system currently in place in the United States is discriminatory against minorities and those of a low socioeconomic status.

Historical Overview

Historically, bail in America dates to the colonial period. Much of the original concepts for the American bail administration system originated from principles of English law; however, America applied these principles in a more liberal fashion (Heaton et al., 2017; Turner & Johnson, 2005; Van Brunt & Bowman, 2018). In 1641, the Massachusetts Body of Liberties granted all individuals accused of committing a crime the right to bail for all non-capital offenses. Pennsylvania adopted a similar rule, and later on, in 1787, the Northwest Ordinance was passed. This ordinance stated that all individuals will be granted bail, except for individuals who had committed capital offenses. The Judiciary Act of 1789 even went as far as to say that in certain circumstances, individuals charged with capital offenses could be eligible for bail. During this time, wealth was not a factor in the decision to release (Van Brunt & Bowman, 2018).

Contrary to these early colonial principles regarding bail, when the Constitution of the United States was written, there was no mention of an absolute right to bail. The Eighth Amendment protects against excessive bail charges, but there is no specific right to pretrial release (Turner & Johnson, 2005; Van Brunt & Bowman, 2018; Williams, 2016). This lack of mention of bail in the Constitution has had significant consequences and continues to be a vast problem in today's society.

While the Constitution itself does not mention citizens' rights to bail, the majority of early state constitutions contain the right to bail. This system did not require a payment upfront; instead, the defendants paid if they did not return to court (Van Brunt & Bowman, 2018). Oftentimes, individuals who had a relationship with defendants were willing to take responsibility to ensure that they did in fact return to court. However, as time progressed, the United States experienced a changing demographic and a massive population expansion, and this

led to the decline of individuals who were willing to take responsibility for defendants. This led to the creation of the bail bond industry, which is still in place today in the majority of states (Van Brunt & Bowman, 2018).

The bail bond industry provided individuals with an opportunity to seek bail, even if they did not have the funds to pay the entire amount. Defendants had to pay a small fee and then provide some type of personal collateral to receive the bond. While this concept is theoretically put into place to help those who cannot afford bail, it hurts lower class individuals and minorities because the bail amounts, even with the help of the bail bond industry, are often too high for defendants to pay (Van Brunt & Bowman, 2018). In 1927, Arthur L. Beeley conducted a study that focused on both bail and detention practices at a local county jail. He found that the majority of defendants remained in jail because they could not afford bail. The amount of bail in any case is determined without looking at an individual's socioeconomic history or current financial status. This often leads to judges granting defendants excessive bail amounts that defendants cannot pay. Overcrowding in jails can be attributed to, in some cases, defendants' poverty (Van Brunt & Bowman, 2018).

Types of Bail

There are various types of bail that defendants can be released upon. There are cash bonds, property bonds, the use of a bail bondsman, unsecured bonds, and ROR, which stands for "released on one's recognizance" (Heaton et al., 2017; Williams, 2016). Cash bonds are when defendants pay the entire amount of money set by the court for the bond. Property bonds are used when defendants provide some type of collateral to the court in exchange for their release, such as their car. Bail bondsmen are used when defendants pay a bondsman a small sum of money for the bondsman's services, and in turn, the bondsman provides insurance to the court that the

defendants will appear and continue to appear at court dates. Unsecured bonds are used when the defendants do not pay any amount of money nor collateral to the court but are required to pay the entire amount of the bond if they do not appear at all court dates.

Lastly, release on recognizance bonds are bonds in which the defendants do not pay any sum of money nor any type of collateral and are released upon the assumption that the defendants will show up to all court dates. This type of bond can be revoked if the judge feels that the defendants may stop appearing or are dangers to the community (Heaton et al., 2017; Williams, 2016). While release on recognizance bonds can be beneficial to offenders who are poor because they do not have to pay any money up front, a very small number of offenders are actually given this type of bond (Williams, 2016).

Factors Influencing Decision to Grant Bail

The main factor that impacts the court's decision to grant bail is whether the defendants are flight risks or not. If defendants are determined to be a flight risk, there is virtually no chance that they will be granted bail (Holsinger & Holsinger, 2018; Raphling, 2018; Schlesinger, 2005; Williams, 2016). Other factors that influence the court's decision to grant bail to defendants include the seriousness of the offense committed, prior criminal history, and if the defendants pose a threat to the community if released (Holsinger & Holsinger, 2018; Sacks et al., 2015; Williams, 2016). While these variables appear to be legal variables and non-discriminatory, judges can use extra-legal factors when making a decision regarding bail. Examples of these extra-legal factors include race and gender (Freiburger, Marcum, & Pierce, 2010; Sacks et al., 2015; Williams, 2016). Research indicates that offenders who are African American and Hispanic/Latino are less likely than whites to be released on bail, and females of any race are more likely than males to be released on bail (Williams, 2016).

Another factor that plays a role in the decision to grant bail is the blameworthiness of the offender. Blameworthiness is a combination of the extent to which the offender caused harm and the accountability of the offender (Williams, 2016). Judges often do not have much time to make the decision of whether to grant bail. Due to this lack of time, judges use what are known as racialized attributions to help direct the decisions that they have to make. Racialized attributions include racial and ethnic stereotypes that judges apply in order to fill in the information gaps that they do not know about defendants (Schlesinger, 2005). Research indicates that offenders who have criminal histories and who have been charged with more serious criminal offenses in the past are more likely to be viewed by the judge as blameworthy (Sacks et al., 2015; Schlesinger, 2005; Williams, 2016). Research also shows that African American males are more likely to be viewed by the judge as blameworthy due to the stereotype that African American males are more dangerous, so they are less likely to be granted bail (Sacks et al., 2015; Schlesinger, 2005; Williams, 2016). When these racialized attributions are reinforced based on results that occur from court cases, the attributions are only magnified and continually supported (Schlesinger, 2005). The mechanisms behind racial attributions and theories about how they are formed will be further explained in the following section of the paper.

Theoretical Perspectives Regarding Judicial Decision Making

In order to attempt to explain the process of judicial decision making in regard to bail, various theoretical perspectives have emerged. These theories have also been formulated in order to help explain how judges form racialized attributions about defendants. These perspectives include the focal concerns theory, the racial formation perspective, and the attribution theory. While these perspectives function on their own, they have been intertwined to help further

explain the process of judicial decision making regarding bail (Schlesinger, 2005). These theories will be further explained in this section of the paper.

Focal Concerns Theory

The focal concerns perspective includes three major aspects, two of which have already been discussed briefly in this paper. The major aspects are the blameworthiness of the offender, the protection of the community, and practical constraints concerning the individual and organizational resources (Freiburger et al., 2010; Sacks et al., 2015; Schlesinger, 2005; Williams, 2016). In regard to determining the blameworthiness of the offender, judges take factors such as the type and severity of the offense, and the offender's prior record into consideration (Freiburger et al., 2010). Judges analyze all of the information regarding the offense, including the degree of harm caused to the victim, if applicable, and the offender's past history regarding crime into account in order to make a decision, such as the decision to grant bail (Freiburger et al., 2010; Sacks et al., 2015; Schlesinger, 2005; Williams, 2016).

The next aspect of the focal concerns perspective is community protection. To determine if the community will be safe if the offender is released, judges weigh personal factors such as the offender's employment and marital status. They also take into consideration the severity of the offender's prior record, and if the offender appears to be a danger to society if he/she is released (Freiburger et al., 2010; Sacks et al., 2015; Schlesinger, 2005; Williams, 2016).

The final aspect of this perspective regarding judicial decision-making focuses on practical concerns regarding the individual and organizational structure. In this case, the judge weighs the costs and benefits of further incarcerating the offender (Williams, 2016). Factors such as the capacity of the intended jail and the offender's well-being if incarcerated for a long period of time are considered. If the jail has a limited amount of space, the judge may decide to grant

bail based on the lack of space and to decrease overcrowding. If the offender appears to have mental health problems or substance abuse related issues and the judge does not think that spending time incarcerated would be the best option, the judge can recommend community treatment programs instead (Williams, 2016).

The Racial Formation Perspective

The racial formation perspective is another perspective used to help explain judicial decision making. In this perspective, it is stated that every racial group has its own distinct attributions that are perceived by others. An example of a stereotype is that African American males are perceived as more dangerous than individuals of other races (Sacks et al., 2015; Schlesinger, 2005). The perspective further states that judges form expectations based on these stereotypes, such as whether defendants will appear at trial, whether the defendants will reoffend, or whether the defendants are dangers to their communities. Research suggests that while African American individuals are unfairly stereotyped most often, Hispanic/Latino individuals also face negative stereotypes frequently (Schlesinger, 2005).

The Attribution Theory

The attribution theory posits that negative attributions or stereotypes about a specific racial/ethnic group are further magnified when a case involves specific legal factors. An example of this perspective is if a judge has the preconceived notion that African American males are more dangerous and commit more violent offenses, if a case involves an African American man committing a violent offense, this preconceived notion will be reinforced for the judge (Sacks et al., 2015; Schlesinger, 2005). As judges do not have the time to research every single offender in depth, this theory proposes that judges use these negative attributes to fill in what they do not

know about an offender in order to make the decision of whether or not to grant bail easier and faster (Sacks et al., 2015; Schlesinger, 2005).

Consequences of Bail Decisions on Jail Populations

In 2008, the jail population in the United States reached its highest number yet at over 785,000 inmates (Williams, 2016). Each day, over 600,000 individuals are incarcerated in jails (Schlesinger, 2005). In 2013, the population had decreased to just over 731,000 inmates (Williams, 2016). On average, jails in America are at 84% capacity, but in some areas, such as California, jails are over capacity by 150%. In regard to bail, 60% of offenders incarcerated in jails are there because of increased amounts of bail and the decreased use of release on recognizance bonds (Williams, 2016). When jails are over their intended capacities, this overcrowding of inmates lends itself to many other problems. Officers in the jails have a difficult time keeping the inmates separated, which can lead to increased victimization and more security issues. Psychological health and physical health are concerns as well because in overcrowded jails, higher rates of depression, anxiety, and suicides have been reported (Williams, 2016).

Effects of Race/Ethnicity on Pretrial Incarceration

It is clear that an individual's race/ethnicity plays a role in whether or not the individual will be granted bail (Demuth, 2003; Donnelly & Macdonald, 2018; Sacks et al., 2015; Schlesinger, 2005; Turner & Johnson, 2005; Williams, 2016). However, there is a problem with the current data collection regarding race and bail, and that is that the majority of the research groups different minority groups together. An example of this is grouping African Americans and Hispanic/Latino individuals together as simply "minorities," as both racial groups are minorities. This is incredibly problematic because it does not accurately depict treatment or discrimination that each group alone receives; therefore, data that does not differentiate between

different racial groups is not reliable (Turner & Johnson, 2005). However, there were some research studies that separated the different races when examining the effect of race/ethnicity on pretrial incarceration, which made the data that was obtained more reliable (Schlesinger, 2005; Turner & Johnson, 2005). Studies mainly examined African American and Hispanic/Latino defendants, and the results will be discussed in the following paragraphs.

African Americans

In regard to African American defendants, they are 33% more likely to be denied bail than white defendants with similar attributes for violent crimes (Schlesinger, 2005). For drug offenses, African American defendants are 80% more likely to be denied bail. They are also less likely to be released before their trials (Donnelly & Macdonald, 2018; Sacks et al., 2015; Schlesinger, 2005; Turner & Johnson, 2005). African Americans are more likely than whites and Hispanics to have bail required in the first place (Sacks et al., 2015). Only 47% of African Americans who are granted bail are able to meet the financial requirements necessary to pay their bail. One study found that the average bail amounts for individuals who were African Americans were four times higher than the average bail amounts for individuals who were white (Turner & Johnson, 2005).

Research shows that the stereotypes of African American people, often propagated by the media, are frequently used by criminal justice officials and these officials see African Americans as dangerous and violent. This belief impacts their decision to grant bail to African Americans in particular (Schlesinger, 2005). African American individuals are also the most likely to have had past jail and/or prison time, prior felony conviction(s), and failures to appear at trial (Schlesinger, 2005).

Hispanics

Hispanic/Latino defendants are 67% more likely than whites to be denied bail, and also receive bail amounts that are, on average, 26% higher than whites (Demuth, 2003; Sacks et al., 2015; Schlesinger, 2005; Turner & Johnson, 2005). Hispanic defendants also have a 25% lesser chance of being granted a nonfinancial release. Only 33% of Latinos who are given bail are able to meet the financial requirements necessary to pay their bail. Latinos are also the racial group that is incarcerated pretrial most often (Demuth, 2003; Sacks et al., 2015; Schlesinger, 2005).

Effects of Not Being Able to Pay Bail

There are many adverse effects that can result from defendants not being able to pay their bail. When defendants cannot pay their bail, they are placed in detention while waiting for their trials (Turner & Johnson, 2005). Being incarcerated inhibits their abilities to assist in their defenses because they do not have much access to counsel, do not have reliable ways to help locate evidence or witnesses, and overall, cannot do much to help their cases. Incarcerated defendants can also become labeled as dangerous, which can affect how they are treated at trial, and potentially affect the outcome of their cases (Heaton et al., 2017; Holsinger & Holsinger, 2018; Sacks et al., 2015; Turner & Johnson, 2005). Research indicates that defendants who are unable to pay their bond tend to receive increased prison sentences (Turner & Johnson, 2005).

Pretrial detention also affects defendants' personal lives in many negative ways. By being detained, even for a short period of time, defendants could potentially lose their jobs, residences, and even custody of their children (Heaton et al., 2017; Holsinger & Holsinger, 2018). A research study found that offenders who were employed prior to their incarceration experienced salary cuts after they were released (Holsinger & Holsinger, 2018). Offenders' education and/or job training can also be affected by being detained pretrial. A disproportionate number of those

incarcerated in jails have mental health problems and/or substance dependence problems, which are issues that are only further exacerbated while being incarcerated (Holsinger & Holsinger, 2018).

Policy Implications

Much of the existing research did not focus on female defendants, thus more research on females is necessary, particularly regarding the race/ethnicity of females and how they are treated in regard to the bail system. The literature stated that females tend to receive lesser bonds than males, but there needs to be more research to determine the specific factors of why this is the case (Schlesinger, 2005). A large amount of the research only focused on African Americans and Hispanic/Latinos and neglected other minorities, such as Native Americans and Asians. More studies should be conducted to see the effects of the races/ethnicities of these minority groups regarding the bail system (Schlesinger, 2005).

Pretrial incarceration has some incredibly negative consequences. These consequences include causing the offenders psychological trauma, as well as increased chances of victimization and physical illnesses. Research should be conducted on other alternatives to incarceration to determine if there are other ways to rehabilitate offenders to avoid detaining them. This could potentially reduce overcrowding in jails, and therefore in prisons as well (Heaton et al., 2017; Williams, 2016).

Oftentimes, judges do not grant defendants bail because they are afraid that the defendants are flight risks and will attempt to flee. However, a small number of defendants actually flee; instead, they miss court dates for other reasons, such as poverty, homelessness, and mental illness. Implementing programs in order to help individuals with issues such as these

could decrease incarceration rates while helping defendants at the same time (Donnelly & Macdonald, 2018; Raphling, 2018).

Another potential policy implication regarding the bail system is to set the bail amounts relative to the defendants' incomes and/or other assets. Doing this would help ensure that all defendants are treated equally and that the wealthy do not have an unfair advantage to those who are not as wealthy (Sacks et al., 2015; Starger & Bullock, 2018). Donnelly and Macdonald (2018) suggest eradicating cash-only bail methods and switching to alternative measures, such as ankle monitors or checking in with probation officers. The utilization of these types of alternate methods would help the courts keep track of defendants, particularly those who they would consider to be flight risks. These alternative measures would also help ensure that all defendants are treated equally, and could also reduce overcrowding and save the states thousands of dollars that would be spent on keeping a higher amount of offenders incarcerated (Donnelly & Macdonald, 2018; Heaton et al., 2017; Sacks et al., 2015; Starger & Bullock, 2018).

Judges have broad discretion when deciding which bail amount to set for each defendant. A research study found that defendants who received a stricter judge who tended to set unreasonably high bail amounts were more likely to enter a guilty plea as well as receive harsher sentences (Heaton et al., 2017). By implementing new policies that have set standards that limit the discretion a judge can use when deciding what the bail amount is for each defendant, the bail system could be fairer to all defendants (Heaton et al., 2017; Holsinger & Holsinger, 2018). The theoretical perspectives mentioned can help researchers understand the process behind judicial decision making regarding bail, thus more research studies can be conducted on those various theories, including the focal concerns theory, the racial formation theory, and the attribution theory, as well as other theories. More knowledge on the factors that play into judges' decisions

to grant bail would be beneficial for new policies and procedures, and potentially training opportunities for judges as well. Scenario-based training programs could help judges learn how to eliminate racialized attributes in order to make the process of judicial decision making more fair and just in all aspects, not just the bail system alone (Freiburger et al., 2010; Sacks et al., 2015; Schlesinger, 2005; Williams, 2018).

Conclusion

Overall, it is extremely evident that the bail system needs reform. In regard to race and ethnicity, research shows that these attributes play a large role in determining which offenders are granted bail (Alexander, 2012; Freiburger et al., 2010; Heaton et al., 2017; Holsinger & Holsinger, 2018; Sacks et al., 2015; Turner & Johnson, 2005; Walker et al., 2018). Those of a low socioeconomic status are also not treated fairly in the bail system because their financial status puts them at an extreme disadvantage. Offenders who are not granted bail, along with those who have been granted bail but cannot afford it, are at higher risks for being found guilty and thus convicted, thereby receiving harsher sentences (Alexander, 2012; Heaton et al., 2017; Holsinger & Holsinger, 2018; Sacks et al., 2015; Turner & Johnson, 2005; Walker et al., 2018). Individuals who are wealthy have an automatic advantage within the bail system because those who cannot afford to pay their bail have a multitude of negative consequences that they could suffer as a result. Examples of these negative consequences include potential loss of employment, loss of residential stability, and, as previously stated, a stronger possibility of being convicted (Heaton et al., 2017; Holsinger & Holsinger, 2018; Sacks et al., 2015; Turner & Johnson, 2005).

Factors such as being a flight risk and being a danger to the community are obvious indicators to a judge that an offender should not be granted bail. However, judges can use their

own discretion to grant bail and also to set the bail amounts, which are often tainted by racialized attributes and stereotypes. Theoretical perspectives have been applied to the judicial decision making process in order to help provide more information as to how judges make decisions regarding bail and what factors play into that decision (Freiburger et al., 2010; Sacks et al., 2015; Schlesinger, 2005; Williams, 2016). These stereotypes can lead to unfairly treating African Americans in regard to bail because of the many negative stereotypes that surround them (Sacks et al., 2015; Schlesinger, 2005; Williams, 2016). While it is evident that minorities suffer from the bail system much more than whites, individuals who are Hispanic/Latino suffer the most. These individuals are the least likely to be able to pay their bail due to having their bails set extremely high, as well as being much more likely to be denied bail in the first place (Demuth, 2003; Sacks et al., 2015; Schlesinger, 2005; Turner & Johnson, 2005).

Many policy implications have been discussed that suggest new policies and practices in order to reform the bail system. Implementing these changes could reduce jail overcrowding, and thus prison overcrowding as well. Eliminating cash-only bonds and switching to alternative methods of keeping track of offenders besides incarcerating them could save states thousands of dollars, while simultaneously helping offenders rehabilitate and not have to suffer as many negative consequences, such as losing their job due to being incarcerated (Donnelly & Macdonald, 2018; Heaton et al., 2017; Holsinger & Holsinger, 2018; Sacks et al., 2015; Starger & Bullock, 2018; Williams, 2016). Overall, it is imperative that more research be conducted in order to further specify how the bail system can be improved, and new policies and procedures can be put into place from there. These new policies and reform efforts will not happen overnight; however, small changes can be made in the right direction in order to ensure that

racial/ethnic discrimination as well as discrimination against minorities is virtually eliminated from the bail system.

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