Pretrial Bond

Presumptions, Measurements, and the Avoidable Consequences of Detaining Low-Risk Defendants

By Lori K. Shemka

> Rules under which personal liberty is to be deprived are limited by the constitutional guarantees of all, be they moneyed or indigent, befriended or friendless, employed or unemployed, resident or transient, of good reputation or bad. *** Some are, no doubt, of bad reputation and present a risk of nonappearance or of new criminal activity. But they are not without constitutional rights to due process and the equal protection of the law.[1]

We sometimes forget that personal recognizance release pending trial is presumed by Michigan's court rule with limited exception:[2]

- Cash or surety bond is required when the defendant is charged with a crime alleged to have occurred while already out on personal bond.[3]
- Cash or surety bond is required when the defendant has already been twice convicted of a felony within the last five years.[4]
- A court may set a *no bond* if a defendant is charged with murder or treason, committing certain violent felonies, criminal sexual conduct in the first degree, armed robbery, or kidnapping with the intent to extort money or other valuable thing.[5] However, the court does have the discretion to set a bond.[6]
- Detention can be ordered when the court is presented with a record of conditions that *necessitate* pretrial detention under MCR 6.106(B).

Precisely because Michigan presumes personal recognizance release pretrial, it naturally follows that money or surety bond can *only* be required when a court affirmatively makes a record of how "the defendant's appearance or the protection of the public cannot otherwise be assured."[7]

And yet, despite the court rule's personal recognizance release presumption and the defendant's presumption of innocence, too many taxpayer-funded jail beds are filled by those who are charged with a nonviolent offense, have no warrant holds, and are unable

to afford bond pretrial.[8] Instead of equal justice under law, defendants and taxpayers are being forced to foot the bill for unfair, costly policies that don't achieve their intended objectives. This is not unique to Michigan. In fact, pretrial justice practices have attracted greater scrutiny across the country.

Improper bail-setting approaches

As a matter of first principles, money bail is supposed to be reserved for those who are flight or danger risks. It was once assumed that affixing a financial price tag to someone's pretrial release would ensure future court appearances and promote public safety. Now we know better. No such causal relationship has been identified by peer-reviewed research.[9]

A different type of problem is presented when judges set a high bail anticipating that it will be a "no bond." This is a risky calculation, of course, because a person who truly presents a public safety risk and has the financial means to purchase his or her freedom will be released *and will remain a public safety risk*.[10]

Another troubling custom is when a bond is set with the judicial assumption that the defendant will post and then using that posted bond as a "security deposit" to be applied to any future fines and costs assessment.[11] This "get the money up front" approach lacks legal support. A system that countenances a security-deposit-like approach wrongfully presumes there will be fines and costs down the road, undermines the defendant's presumption of innocence, and erodes public confidence in an impartial judiciary.

Further complicating many current bail practices in cases where there is no safety concern is the accused's ability to pay. In nonviolent cases, the state constitution requires that the defendant must be able to afford any financial bail.[12] People cannot remain in jail while awaiting trial *simply because they cannot afford to bond out*. This is why nonprofits such as Equal Justice Under Law and Civil Rights Corps are forcing change across the country by successfully litigating class-action suits against courts and judges for excessive bail practices, including bail schedules.[13]

At least one more problem exacerbates any equal protection violation: the indigent—including some who are innocent—remain locked up because they cannot afford a payment of even a few hundred dollars (and then ironically run up a jail-stay tab) and are coerced to plead guilty and earn credit for time served so they can be released as soon as possible.[14] These defendants may have no appreciation for their plea's collateral consequences. They are set up for long-term failure because our judicial system fails them.

What does Michigan's data suggest? (Answer TBD)

"It's time for Michigan to collect data and take a hard look at whether its 'business as usual' bond-setting practices are sound." That is the takeaway from the August 2017 Criminal Justice Policy Commission recommendation to the Michigan legislature, which:

- Recognizes the ongoing nationwide study of pretrial trends and detention practices
- Recognizes that this national review has found evidence of inappropriate uses and nonuses of pretrial detention in other jurisdictions
- Recommends that Michigan's pretrial practices be reviewed and evaluated
- Recommends that the legislature determine whether pretrial detention is being appropriately used
- Recommends that the evaluation assess whether appropriate factors are being considered to determine bail and whether the statutory or court rule factors need to be modified
- Recommends that the legislature either assist in implementing a system to collect and study the data or provide the commission or another entity the resources to answer these questions[15]

This is not a new idea. Governor Rick Snyder similarly encouraged pretrial reform, including the adoption of risk-based bail-setting practices, in his 2015 Special Message on Criminal Justice.[16] The American Bar Association House of Delegates independently supported the presumption of personal recognizance release unless public safety or flight is at risk, and

At a Glance

All bail decisions begin presuming one's release on personal recognizance unless there is an identified risk of failure to appear pretrial or a safety threat.

In nonviolent cases, the state constitution requires that a defendant must be able to afford bail.

Low-risk defendants held for two days to two weeks are much more likely to commit crimes before trial and within two years after completion of their cases than equivalent defendants held no more than 24 hours.

encouraged ability to pay determinations when it adopted Resolution 112C in August 2017.[17]

Today's environment compels the judiciary and its partners to begin scrutinizing the reflexive bond-setting practices some may be accustomed to during arraignments—even before state policymakers begin the process of court- and judge-level data collection and analysis.

Where are we now?

The court rule's bond-setting factors have changed very little during the last 40 years.[18] Better data and validated research clearly make the case for revisiting habits and making sure that our criminal justice processes remain focused on our constitution's intended purposes.

Courts throughout the country are piloting different risk assessment tools to better isolate and address those variables that more closely correlate with pretrial success and failure. Numerical weights are assigned to different variables, and the totals are plotted on a risk-level grid. None of the tools are perfect. People are complicated, after all, and data is only valuable if it is correctly and consistently collected and properly managed. This is why risk assessment tools require regular revalidation and adjustment based on local data.[19]

The Public Safety Assessment, developed by the Laura and John Arnold Foundation, is used by many jurisdictions across the county. It gauges failure to appear, new criminal activity, and new violent criminal activity by weighing nine risk factors:

(1) Age at current arrest

(2) Whether the current charged offense is violent

(3) Whether there are other pending charges at the time of the offense

(4) Any prior misdemeanor convictions

(5) Any prior felony convictions

(6) Any prior violent convictions

(7) Any prior failures to appear within the last two years

(8) Any prior failures to appear older than two years

(9) Any prior incarceration sentences[20]

Ideally, a court can obtain these data points pre-arraignment without the need for a personal interview.

A growing number of Michigan pretrial services programs prepare risk assessments using a different tool, the Michigan Praxis, which shares many similarities with the Arnold Foundation's assessment. Unlike the foundation's tool, the Michigan Praxis additionally weighs information that can only be obtained and verified through an in-person interview.[21]

No matter which risk assessment tool is used, judicial discretion remains. Risk assessment scores are only an information point for judges; they do not dictate. The judicial officer always remains responsible for determining nonappearance or safety risk(s).

Least restrictive means ≠ high dollar bonds or pretrial detention

If a defendant is not entitled to personal recognizance release because the court has affirmatively made a record regarding the defendant's safety or nonappearance risk, the court still has a responsibility to impose the *least restrictive* necessary means when setting bond.[22] Judges have many options, but none should be conditioned on a defendant's ability to post a financial or security bond.

If, for example, the defendant has a demonstrated drinking problem and has been deemed a public safety or failure-to-appear risk, the court can impose a conditional bond that includes a transdermal tether, an interlock ignition device, or both.

If the safety concern is whether the defendant remains within or outside of dedicated zones, a conditional bond with a GPS tether (even with victim notification) may be sufficient.

If the court believes that minimal pretrial supervision is warranted but lacks the personnel to handle in-person reports (or perhaps the defendant's work schedule conflicts with the window for regular in-person reports), a conditional bond using a smartphone-based GPS solution may be prudent. (Incidentally, this solution is cheaper than tethers and avoids the public visual stigma of a tether. Additionally, the court has no onsite equipment to manage and can push court date reminders to the defendant's smartphone.)

There's another accountability tool worth remembering: courts are not limited to the bond revocation processes even if the defendant violates a bond condition. Instead of revoking one's bond, courts can use their criminal contempt powers to punish under MCL 600.1701. That route creatively opens up the options of a fine, probation, or short-term incarceration.[23]

Unnecessary pretrial detention of low-risk defendants is expensive and unsafe

Pretrial detention—undoubtedly necessary in certain circumstances—is expensive for taxpayers, defendants, their families, and communities. *Unnecessary* detention independently jeopardizes long-term public safety.

What are the financial costs? Daily jail costs vary by Michigan county, but can range from $35 to nearly $200 per inmate. Each jail is independently operated and funded by local taxpayers. While centralized data is not yet available, sheriff officials estimate that 40–60 percent of local jail populations are individuals awaiting trial.[24] We don't know how many of those are *low-risk*—at least not yet.

What is the public safety concern when there is excessive pretrial detention? National studies warn that the longer a low-risk defendant is detained before trial, the more likely the defendant is to commit a new crime within two years. Once job or housing loss is triggered by pretrial detention, additional public safety risks follow because a defendant often resorts to criminal activity for future survival (and because new "skills" and associational networks have been acquired from cellmates). When held 2–3 days, low-risk defendants are

almost 40 percent more likely to commit new crimes before trial than equivalent defendants held no more than 24 hours. When held 8–14 days, low-risk defendants are 51 percent more likely to commit another crime within two years after completion of their cases than equivalent defendants held no more than 24 hours.[25]

Considering these negative and costly potential outcomes, the judiciary must be thoughtful about the unintended but inevitable consequences of nonpersonal-recognizance bail decisions for low-risk defendants. There are better ways to protect the rights of defendants and save taxpayers the cost of paying for jail beds.

Conclusion

The state constitution and court rules require personal recognizance release unless failure to appear or safety risks are present. Validated national research, new practices, and improved monitoring tools enable courts to better identify those risks and make more informed and effective bail determinations.

Michigan's justice system has an opportune moment to reflect on its current practices and pursue further collaboration with its local jail officials, community correction professionals, and budget appropriators. Ensuring that bail decisions are based on risks of pretrial flight or safety, are of the least restrictive necessary means, and take one's ability to pay into account is the right approach under the constitution for the defendants and their families, for public safety, and for taxpayers. ■

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ENDNOTES

1. *O'Donnell v Harris Cty*, 251 F Supp 3d 1052, 1167 (SD Tex, 2017).
2. MCR 6.106(C).
3. MCL 765.6a(1).
4. MCL 765.6a(2).
5. Const 1963, art 1, § 15 and MCR 6.106(B), but see MCL 765.5.
6. A $1 million bond, with any release to be on GPS tether, was set when the defendant was charged with first-degree murder. Peterson, *Man charged with premeditated murder in wife's death*, WNDU (August 16, 2017) <http://www.wndu.com/content/news/Husband-charged-in-wifes-death-after-reported-home-invasion--440592603.html> [https://perma.cc/J9WW-VEKN]. All websites cited in this article were accessed November 21, 2018.
7. MCR 6.106(E) and MCR 6.106(F)(1), (2). See also *People v Spicer*, 402 Mich 406, 409 (1978).
8. Robertson, *Macomb County Report: Jail Needs Analysis & Criminal Justice System Assessment* (October 2016), p 11 <https://media.clickondetroit.com/document_dev/2017/05/05/Criminal%2BJustice%2BSystem%2BAssessment%2B2016_1494006512327_9706310_ver1.0.pdf> [https://perma.cc/RQ49-MWR3].
9. Roelofs, *The price of Michigan's cash bail system*, Bridge Magazine (November 15, 2016) <http://www.bridgemi.com/public-sector/price-michigans-cash-bail-system> [https://perma.cc/Q9FG-RA8T].
10. Hoag, *Prosecutors allege 3 men tried to rob undercover officer in Saginaw*, Saginaw News (November 25, 2015) <http://www.mlive.com/news/saginaw/index.ssf/2015/11/3_charged_in_alleged_robbery_o.html> [https://perma.cc/4RDA-XG3D] and Kransz, *Man out on bond in police robbery attempt back in jail after alleged chase*, Saginaw News (December 28, 2016) <http://www.mlive.com/news/saginaw/index.ssf/2016/12/man_out_on_bond_in_police_robb.html> [https://perma.cc/B7XM-LSU4]. Scott Clark was charged in 2015 with multiple felonies for conspiring to rob an undercover narcotics officer. After posting a $95,000 bond, he picked up new charges: unlawfully driving away an automobile, third-degree fleeing and eluding police in a motor vehicle, and driving while intoxicated. Bond was revoked on the original case and bond on the new charges was set at $100,000.
11. MCR 6.101(I)(3).
12. US Const, Am VIII; Const 1963, art 1, § 16; MCL 765.6(1). See also *US v Salerno*, 481 US 739; 107 S Ct 2095; 95 L Ed 2d 697 (1987).
13. Equal Justice Under Law, *Ending American Money Bail* <https://equaljusticeunderlaw.org/money-bail-1/> and Kimmey, *Ending Wealth-Based Pretrial Detention*, Civil Rights Corps <http://clarissa-kimmey-nfbt.squarespace.com/ending-wealth-based-pretrial-detention/>.
14. Roelofs, *We hope you enjoyed your stay at the county jail. Here's your bill* (December 13, 2016) <http://www.bridgemi.com/public-sector/we-hope-you-enjoyed-your-stay-county-jail-heres-your-bill> [https://perma.cc/M2ET-294F].
15. Criminal Justice Policy Comm, *Adopted CJPC Recommendations as of 8/2/2017* <http://council.legislature.mi.gov/Content/Files/cjpc/Approved%20CJPC%20Recommendations.pdf> [https://perma.cc/3557-AU9Y] and Pepin, *2012–2013 Policy Paper: Evidence-Based Pretrial Release, Final Paper*, Conference of State Court Administrators (COSCA) <http://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/Evidence%20Based%20Pre-Trial%20Release%20-Final.ashx> [https://perma.cc/JT3P-NBLE].
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21. See, e.g., Oakland County Community Corrections Advisory Board, *Bench Guide 2018: Pretrial Services Assessment*, p 14 <https://www.oakgov.com/commcorr/Documents/BenchGuide.pdf> [https://perma.cc/AD75-GE2U]. For more information on the Michigan Praxis tool, contact Barbara Hankey of Oakland County Community Corrections at hankeyb@oakgov.com or (248) 451-2306.
22. *ABA Standards for Criminal Justice (3rd ed)*, Standard 10-1.2: Pretrial Release, pp 39–41 <https://books.google.com/books?id=5W3COy3hvNAC&pg=PA39&lpg=PA39&dq=American+Bar+Association,+Criminal+Justice+Section+Standards,+Pretrial+Release,+Standard+10-1.2.&source=bl&ots=QWq-3g-Sfr&sig=y7LCHy64NLaWtqRJdJXs8lvAMag&hl=en&sa=X&ved=2ahUKEwj_kfyb0ufeAhVTjoMKHe9bClQQ6AEwDnoECAMQAQ#v=onepage&q=American%20Bar%20Association%2C%20Criminal%20Justice%20Section%20Standards%2C%20Pretrial%20Release%2C%20Standard%2010-1.2.&f=false>.
23. *People v Mysliwiec*, 315 Mich App 414; 890 NW 2d 691 (2016).
24. May 2, 2017, to May 8, 2017, email exchanges between the Michigan Sheriffs' Association and the State Court Administrative Office (on file with author).
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