The American Bail System

Fall 2019 Syllabus
Thursdays 4:20–6:10
Columbia Law School

INSTRUCTOR  Kellen Funk, Associate Professor of Law

ROOM        WJWH 101

OFFICE      Room 901
             Wed. 2:00 – 4:00, otherwise open door or by appointment

CREDIT      2 credit research seminar
             substantial final paper

DESCRIPTION Three-quarters of the incarcerated population in America is awaiting trial, while commercial bail continues to be a thriving $2 billion-a-year industry. This seminar will examine in depth the United States’ virtually unique reliance on commercial sureties as the leading alternative to detention before trial. We will examine the history of wealth-based detention, the socioeconomic and racial effects of pretrial release and detention, and the many levels at which bail and bond is regulated, from state and local municipal codes to Supreme Court doctrine. Above all, we will focus on bail as a system, considering how American federalism, legislation, law enforcement, commercial incentives, and charitable interventions combine to
create day-to-day practices churning defendants through the criminal courts. Students are invited to range widely in their research papers and draw on methods from legal history, sociology and economics, moral philosophy, or black-letter doctrine.

Like many aspects of pretrial procedure, bail has been largely overlooked in academic literature and in legal theory. But landmark reforms and high-profile litigations in the last half-decade have placed bail at the leading edge of access to justice, poverty law, and a host of constitutional issues relating to the rights of the criminally accused. The required readings aim to familiarize you with the universe of pretrial policy and potential bail reforms. As you hone in on a research topic, you should plan to read deeply the suggested readings that relate to your topic (and the sources they cite).

**Policies**

Grades are based on class participation (20%) and a final paper (80%). Class participation is broadly defined and includes office hours and email conversations. The final paper of at least 20 pages should draw on course materials and original research and provide a thoughtful analysis on any topic related to bail. There is a lot of terrain to be explored, and work on bail will be eminently publishable.

All course materials will be posted to Courseworks or will be otherwise accessible online. Laptops are permitted in class so long as they do not obstruct conversation. Please notify me of absences in advance when possible so I can order a recording.

**Sept. 12**

**Bailment in People and Wealth-Based Detention in U.S. History**

**Summary**

We begin with the history of American bail, such as it is. Bruce Mann’s work focuses on imprisonment for (civil) debt, but it helpfully describes the procedural structure that remains in place for criminal bail, including crucial distinctions between secured and unsecured bonds. Mann does a masterful job of historical recovery on conditions at the New Gaol, the debtors prison in Manhattan. He will also lead us to our first great puzzle in the history of bail: why did civil imprisonment for debt become the leading target for nineteenth-century humane reform, while criminal imprisonment for debt remained undisturbed into the twenty-first century?

We then turn to bail reformer Tim Schnacke’s overview of the American history of bail. Note the focus on the 1960s turning point. Another question that will last through the course is why did bail reform languish after the ‘60s? Can we draw any lessons that would predict the success of bail reform today? A question to keep in mind for future work is what to make of this history. Can it give us any grip on doctrinal arguments about the U.S. Constitution’s Eighth or Fourteenth Amendments?
Readings
Bruce Mann, Republic of Debtors (2010), Intro., Ch. 1, Ch. 3.

Suggested:

Sept. 19 Bailors and Bounty Hunters

Summary
Although Anglo-American bail regimes have relied on a surety system literally since time immemorial, commercial sureties—those who stand surety because they are tied to a bailee by payment rather than kinship—have a much more recent history. Most common law jurisdictions (and indeed, the entire civilian world) have consistently outlawed commercial surety systems. The first commercial sureties were authorized in the United States in 1898.

In this class we will examine the world of the bondsman—a world constructed largely of state licensing and regulation. We will first look at the triangle formed by the bondsman, the state, and bond insurers. How has the rise of insurance conglomerates standing behind small bail bonds shops altered the legal and economic landscape of bail? We will start in North Carolina, where the insurance lobby has had clear success in extracting favorable regulation.

We then turn to the lived—if somewhat mythical—experience of bondsman exercising their powers granted by state law, as well as their struggles when the state strips those powers away (as New Jersey is currently attempting to do). We’ll examine the legal apparatus that supports the creation of Dog the Bounty Hunter, a self-styled black-garbed special ops dragoon who is, by his family’s account, a representative figure of the American bondsman. Ironically, these bondsmen are running up against the same federal court barriers that often stymie litigation against the money bail system.
Readings

Brent Johnson, “*Dog the Bounty Hunter*” Sues Chris Christie, NJ.com, July 31, 2017.

Suggested:
Justice Policy Institute, *For Better or For Profit* (Sept. 2012).

Sept. 26 Ballees

Summary

This week we turn from bailors to examine the experiences of ballees, those who are actually released from pretrial detention on bond. We start with an argument about ballees’ rights to monitoring. On the one hand, the growth of public pretrial services programs may represent dramatic progress in the reform of money bail—especially contrasted to the abusive practices of private bondsmen as detailed in the *Egana* litigation. But as you read, think about what problems these reforms may be introducing. Is pretrial monitoring best thought of as a right or as another kind of surveilled detention? If supervision is always weighed as a lesser evil than outright detention, what’s to prevent systemic oversupervision? On this point we’ll consider evidence from the Bronx Bail Fund, which has been enormously successful at appearance rates despite conscientiously minimal supervision.

Readings

National Sheriffs’ Association Resolution, June 18, 2012.
Suggested:

Oct. 3 Detainees

**Summary**
From bailees—those released on bond—we turn to detainees—those unable to make bond. We start with the case of Sandra Bland (well worth reading up on if you weren’t aware of the case as it was unfolding in 2015) to remind ourselves of the very high and very personal stakes of pretrial detention for failure to pay bail. The bulk of our reading is much more impersonal—but important. There has been an explosion in sociological literature in the past two years documenting the effects of pretrial detention on case outcomes, future criminal activity, and quality of life for criminal defendants and their dependents. These studies are becoming key evidence in legislative hearings and litigation against secured money bail systems. You’re welcome to read them all, particularly if you have a background in statistics or sociology, but you are required to read only one in depth. Pay close attention and be prepared to discuss the methodology of these studies. One can’t conduct a truly randomized experiment on a prison population (that would be an incredible violation of equal protection!), so how have these authors thought their way around that problem? Can any of them really make a strong causal claim about the effects of pretrial detention? How should that shape the course of reform?

**Readings**

One of:


Suggested:

### Oct. 10 Victims

**Summary**
For most of legal history, crime was a personal wrong with social implications, and victims had a large role in prosecuting crime and seeking restoration (such as it was) through the criminal process. Modern American criminal law was premised on the idea that crime was purely a social wrong with social remedies. As the ideological pendulum swings back, we want to ask what role victims should have in the setting of bail and in pretrial procedure generally. What do victims desire, and how should the system account for those desires? How are victims’ desires portrayed politically?

**Readings**
California Constitution, Article I, Section 28.
Oct. 17  **Bail Schedules & Hearings**

**Summary**

Bob Bone once observed in the *Columbia Law Review* that “[e]ach generation of procedure reformers, it seems, diagnoses the malady and proposes a cure only to have the succeeding generation’s diagnosis treat the cure as a cause of the malady.” We will see that cycle this week as we consider bail schedules and hearings, by far the dominant apparatus for making bail determinations in the majority of American jurisdictions. Bail schedules were at one time the leading edge of progressive reform, promising to discipline wildly variant (and racially discriminatory) bail settings that had been left to judicial discretion. A formalized hearing to determine probable cause and set bail arose as one of the last great criminal due process rights to be established despite the retrenchment of the Burger Court. So we will ask why—culturally, legally, economically—have bail schedules and hearings become the new malady?

Our study will land us squarely in Harris County, Texas, home to the City of Houston, the nation’s third largest jail, and one of the signal litigation victories challenging money bail. We will review recordings of misdemeanor bail hearings entered into evidence in the federal litigation. As you watch, think about how you would remedy any problems that you see.

One possible solution is to appoint counsel at these bail hearings. We will end by considering the literature and the case law debating whether bail hearings should count as “critical stage” triggering the Sixth Amendment right to counsel. What arguments have persuaded courts one way or the other on the question? Given the sociological literature we’ve reviewed the past couple weeks, are those the most persuasive arguments?

**Readings**

*Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc).


Meagan Flynn, *For Decades, Harris County’s Bail System Trapped the Poor. Is that Finally Changing?*, HOUSTON PRESS, June 27, 2017.

*Suggested:*
*Ditch v. Grace*, 479 F.3d 249 (3d Cir. 2007).

Oct. 24 **Risk Assessments**

**Summary**

We now turn to the new leading edge of progressive reform, the adoption of algorithm-based risk assessments designed to guide and “de-bias” judicial decisionmaking. We will read from the Laura & John Arnold Foundation, the non-profit leader in developing and promoting risk-assessment tools. We then look at a set of algorithm-skeptic pieces (not all specifically related to bail) and consider whether they provide valuable warnings for the bail context.

Our key question for this week arises from the discussion last week: is this cure destined to become the new malady? If not, what will help risk assessment tools achieve their aim—a legal change? A cultural one?

**Readings**


**Oct. 31  Due Process & Equal Protection**

**SUMMARY**

This week begins a series of classes dedicated to the doctrinal structure of the American bail system. We’ll use our academic luxury to approach the issues in the reverse order as a court would look at them, by starting with substance and then working towards procedure. So what, substantively, does the Constitution proscribe about money bail? Would a “wealth-based detention system” be unconstitutional? What facts on the ground do you need to know to answer the question as a matter of law?

Constitutional challenges to money bail have found three apparently equally viable routes: equal protection, substantive due process, and procedural due process. We will review the major precedents in these areas as well as legal arguments applying the precedents specifically to money bail. Think back to the Harris County hearing videos or the abusive bailor practices we’ve seen. Our key question now is, what remedy becomes available under each of these doctrinal approaches? Does that make one approach more attractive—pleading requirements aside—or is it better, as some would have it, to try to conflate these approaches into a hybrid doctrine uniquely suited for wealth-based detention?

**Readings**


**Suggested:**


Nov. 7

Race

**Summary**
So far we have thought about constitutional doctrines related to wealth-based detention. This week we will explore the confluence of race and class, first by looking at sociological literature demonstrating how indigent incarceration highly correlates with the confinement of black and brown bodies. But we remain in the midst of our doctrinal study, so we want to ask: Is there a route to turn this literature into a legal argument? If the Reconstruction Amendments and the original § 1983 meant anything, they surely stood for the proposition that (especially southern) jurisdictions could not jail black bodies on a mere accusation and evade federal court review. Why then has the desultory case law on poverty but not racial discrimination become the vehicle for attacking money bail?

And how should advocates pitch their arguments on race, to which imagined audiences? We will examine closely the arguments of Smith and Bell. Whose approach do you find more compelling? More likely to result in change?

**Readings**

Suggested:
Cynthia E. Jones, “Give Us Free”: Addressing Racial Disparities in Bail

**Nov. 14 Federalism**

**Summary** We’ve largely been reading federal case law, but recall Humphrey was handed down by a California appellate court. So first—to put the question positively—what possibilities for bail reform open up when we consider the state courts, as bail is almost entirely a creature of the states? We’ll consider both high court rulings (New Mexico) as well as judge-made court rules (Maryland) that may track with the constitutional arguments we’ve been discussing but also derive authority from state constitutions, local legislation, and extra-constitutional arguments.

But then we have to recall Harris County. What happens when state courts accede in or ignore problems with money bail? The fact that bail is a creature of state law then raises significant problems for federal court review in our federated system. We’ll consider a number of challenges that arise in federalism-centered jurisprudence, including immunity and the difficulties of identifying a “final policymaker” for municipal liability.

**Readings**


*Suggested:*
*Wallace v. Kern*, 520 F.2d 520 (2d Cir. 1975) (often known as Wallace III).
Nov. 21  Recent Developments

SUMMARY  Some of the more significant developments in bail reform have occurred as recently as this past summer. Federal courts of appeals have pared back preliminary injunctions against local bail systems, while the Third Circuit has affirmed the dismissal of challenges to New Jersey’s bail reform.

New Orleans (by municipal council), Chicago (by court rule), and California (by legislation) have revamped their bail systems. California has gone furthest in declaring an end to cash bail. Meanwhile, jurisdictions in Texas have started down the path of settlement. This week’s class will take stock of these developments, and anything else that has happened in the past week!

Circuit Court of Cook County, General Order 18.8A. (July 17, 2017).
One Cook County Judge Bucks Chief Judge’s Order Against Unaffordably High Bail, CHI. SUN-TIMES, Sept. 28, 2018.

Suggested:
Walker v. City of Calhoun, 901 F.3d 1245 (11th Cir. 2018).
Why We’re Calling for a Judicial Sweep in the Misdemeanor Courts, HOUSTON CHRONICLE, Oct. 16, 2018.
Ryan J. Reilly, Mark Zuckerberg and Priscilla Chan Are Funding the Fight to End Money Bail, HUFFINGTON POST, Oct. 11, 2017.

Dec. 5  What Comes Next

SUMMARY  Throughout the term we’ve seen many potential cures for the maladies of pretrial detention result in unexpected and often detrimental consequences. So far, both bail schedules and discretionary risk assessments, individual rights to bail and state rights to order preventive detention, commercial bondsmen and public pretrial services have all continued to recapitulate or perpetuate a system of widespread pretrial incarceration little different from the studies of the eighteenth century we read in the opening week.
But last week ended with news releases on major funding initiatives against money bail, including the decisions of Google and Facebook to no longer run advertising for bailbonding agents. Do these changes represent a cultural shift on bail? Where might that shift take us? Whether secured money bail is reformed or abolished, what takes its place? If mass incarceration is not simply going to continue on in new forms, what are the resources—cultural, legal, economic—that are going to break the cycle?

**Readings**


*Suggested:*
