

Proposal: Cities of Bail: Mapping the Impact of Bail Bond Securities on Urban Communities

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Problem Statement

Around sixty to seventy-five percent of those incarcerated in America's local jails on any given day are unconvicted defendants awaiting trial.¹ Because secured money bail systems remain the standard operations of state courts across the country, the vast majority of pretrial detainees are detained because they cannot afford to post the amount of bail assigned to their cases.² Those who are able to obtain freedom pending trial typically rely on commercial bail bond companies who post bail in exchange for a nonrefundable premium percentage of the total amount. As a condition of posting security, bail bondsmen usually require secured collateral from the defendant or the defendant's close relations should defendant default on the bond. For bail amounts set at or in excess of \$10,000 (the median bail amount in felony cases³), security often takes the form of a mortgage of defendants' homes or those of their kin.

Bail bonding has become a big business in the United States. Every year, the commercial bail industry issues \$14 billion in bonds, often to families seeking to reunite with loved ones, and collects over \$2 billion in profits.⁴ In many cases the sole alternative to pretrial detention, secured money bail can trap individuals and families in a cycle of debt and collection that leads to the loss of income, homes, and other property. Even when property is not defaulted, bail liens can cloud titles to land and assets, harming credit and cutting off access to more productive financial investments. Overall, bail liens and forfeitures can have a profound impact on the composition of urban communities and the accumulation of wealth.

While desperation can drive families to accept disadvantageous terms at any time, the pressure to secure bail has become particularly acute during the Covid-19 pandemic, during which many jails have become epicenters of viral transmission in their communities. The economic consequences of the pandemic can be especially severe for those who have mortgaged their homes to secure a defendant's appearance during a time when court closures and alternative arrangements can make appearance at hearings particularly difficult to navigate. To date, no scholar or institution has systematically studied the extent of securitizing property for bail bonds, nor the rate at which property is forfeited, nor how these rates have been affected during the recent pandemic.

Research Question

The project will investigate the impact of bail bond liens, mortgages, and forfeitures on the makeup of urban communities across the United States. By deeply studying six diverse American urban communities and by employing innovative digital methods, researchers will produce a series of time-lapse maps and other data visualizations to show how liens and forfeitures correlate with, and change, a community's social, economic, and political organization.

In addition to getting a sense of the scope of bail liens and the frequency of their forfeiture, this project will ask: Which communities, if any, are targeted by the bail bond industry? How do bail bond agreements contribute to urban segregation and economic inequality? And what discernable changes to these trends have been wrought by the 2020 pandemic? Project findings will help illuminate broader problems in the civil legal space, including the rise of debt collection lawsuits⁵ and the impact of tangled titles on the accumulation of wealth.⁶ Bail bonds often fall through the cracks of academic legal study as they do not belong fully to the world either of public or private, criminal or civil/commercial law. This project will bridge that divide and illustrate the confluence of criminal justice and the law of debt and property.

Policymakers can use this study to inform their work in a number of ways. Judges and legislators who promulgate bail schedules (advised bail amounts based on the charge or defendant's criminal history) can better assess the costs to the community of maintaining a money bail system at the current scheduled rates.⁷ State and local legislators can consider whether to alter the terms and conditions bondsmen can offer to defendants in order to keep their license in good standing. Or policymakers may find that less expensive interventions (possibly with public subsidies) could generate the same levels of pretrial "performance" at far lower levels of social cost.⁸

Background

When an individual is arrested and charged with a crime, a court determines whether the arrestee may be released, and under what conditions, while his criminal case proceeds. Money bail is the most common condition of release in the United States: the defendant posts money to the court as assurance that he will return to court (and—in many jurisdictions—remain law abiding in the interim). However, when a defendant cannot afford the amount a court requires, he may turn to a commercial bail bond company to post or pledge the payment on his behalf.⁹ In addition to a nonrefundable fee—typically 10 to 15 percent of the total amount—the defendant contracts with the bond company, usually promising to pay back the full bail amount of the bond if he does not meet his obligations.¹⁰ Surety contracts are frequently co-signed by family members or, in some cases, other community members such as faith ministries. As part of the agreement, companies may require defendants or their co-signers to transfer security interests in real property as collateral.¹¹

Security interests in real property are recorded in assessors' records across the United States. Security interests can take a variety of forms, from liens, to second or third mortgages, to *lis pendens* (notice to prospective purchasers that a property's title may be subject to imminent litigation). If the contract terms are met or the bond is fully paid, the company or surety will record a release of the interest. Some county assessors' systems also record notices of foreclosure if the agreement is not satisfied, but usually foreclosures can only be identified by tracing a transfer of property from a separate data collection and linking it to a property subject to security interests such as a bail bond lien.

While many county assessors have digitized county property records and posted them online, numerous research challenges arise. No two municipal bail systems are exactly alike, nor do any two property recording systems use exactly the same terminology or procedures. Records may differ dramatically even between neighboring counties. Researchers must have expertise both in the pretrial bail system and in a local property regime in order to trace the complicated path of debt, release, and foreclosure. Moreover, even though property records may be available online, most counties restrict access to the image of a deed or lien that provides the full information needed for a study such as this unless a per-page fee is paid to the county. Between digital access fees and consultation with local

counsel on the idiosyncrasies of securitizing property, even a largely digital study of bail liens can be quite costly.

The advantage of digitized records is their comprehensive coverage and, in most cases, their timeliness. Records in most jurisdictions are posted online almost immediately, allowing for analysis of securitizations as recent as last week. The prompt digitization of property records permits study of very recent events, including the pandemic and resulting economic hardships and relief efforts.

Methods, Data, Timeline & Budget

Researchers will draw on property records in selected U.S. jurisdictions to document, describe, and visualize the extent of bail bond securitizations of real property and the frequency with which those securities are created, extinguished, and foreclosed. Preliminary investigation has identified six U.S. cities as fruitful for study: **Albuquerque**, New Mexico (Bernalillo County); **Charlotte**, North Carolina (Mecklenburg County); **Jersey City**, New Jersey (Hudson County); **Oakland**, California (Alameda County); **Pittsburgh**, Pennsylvania (Allegheny County); and **Tucson**, Arizona (Pima County). Each city sits entirely within a single county (thus ensuring a consistent property recording system) and within a state that allows transferring security interests in real property as collateral for bail bonds. All cities range between approximately 250,000 and 500,000 residents, according to recent U.S. Census data.¹² Finally, each county recording system has been digitized and is accessible online to varying degrees (three cities are entirely open access; the rest charge download fees of \$0.24 to \$1.00 per page, with bulk discounting available). The project will focus on data from the year 2000 to the year 2020 to the extent data are available across that range.

Using project funds, researchers will bulk purchase property records to collect and organize information about real property that has been collateralized in bail bond agreements. Where possible, information will also include the timing and nature of foreclosures and the duration and satisfaction of liens. The balance of research funds will be used to employ data science analysts to produce time lapse maps and other visualizations. The location of bonded properties will be transposed onto maps of the six cities. Other socio-economic data, including racial demographics and economic growth, can then be transposed onto the maps to display and identify correlations among these phenomena and illustrate changes over time.

The project team will be led by Columbia Law School professor Kellen Funk and will comprise a diverse team of Columbia University student research assistants drawn from the fields of data science, sociology, and law. Researchers will also employ the expertise of local counsel in the identified jurisdictions to interpret county recording systems and local bonding practices as needed. The time expected for project completion is two years, with significant preliminary results available in six months.

Importance of the Project

Scholars of bail have characterized our current moment as the “third generation” of bail reform, a generation critical of using access to money as the sole proxy for pretrial risk.¹³ Lawmakers, judges, scholars, and advocates are newly focusing their attention on the problems of money bail.¹⁴ The harms were made starkly apparent by the widely noted suicides of Kalief Browder and Sandra Bland, both detained because of their inability to post seemingly trifling amounts of bail.¹⁵ The problems of money bail have the attention of the public and are ripe for intervention. The bail bond industry, meanwhile,

and the tendency of money bail to trap individuals in a cycle of debt collection and uproot communities, has received some attention but remains comparatively understudied and unaddressed, largely because so much of the structure and practices of the commercial bail industry are opaque to researchers.¹⁶ The unequal effects of money bail have been amplified during the Covid-19 pandemic, in which pretrial detention has dramatically amplified the health risks of detention while the resources available to secure release have been strained by economic recession.¹⁷ Moreover it is important to study how responses to the pandemic may have unintended consequences for pretrial detention reform. As of this point, it is not known whether and how bondsmen have adjusted to foreclosure moratoria or the credit crisis, and tracking their practices through public property records may shed light here.

The six selected cities cover a diverse array of American geographic and social conditions. Moreover, two of the cities selected for study—Albuquerque and Jersey City—are located within states that enacted landmark bail reforms in the last five years. In 2016, New Mexico voters approved a constitutional amendment that prohibits pretrial detention solely because an arrestee is unable to post bail.¹⁸ In 2017, the New Jersey Criminal Justice Reform Act all but eliminated money bail and created a presumption of release for nearly all defendants unless there is a showing of dangerousness (subject to strict standards of procedure and evidence).¹⁹ By studying these jurisdictions before and after reform, the project will illuminate an oft overlooked impact of bail reform on local communities and provide local leaders and policymakers with information to promote a modern and equitable pretrial justice system. (California has also entered a period of significant bail reform, but as the most significant reforms will not take effect until 2021, results of the reform are unlikely to appear in this project’s study of Oakland.)

While the issues identified in this study are not unique to urban jurisdictions, the concentration of data in the candidate cities make the costs of the study feasible while providing sufficient data for statistically rigorous study. Using this project as a model, other researchers can expand its potential applications to rural jurisdictions or to America’s largest cities.

Qualifications

Columbia Law School is a globally respected professional graduate school and the only law school to offer academic instruction on the American bail system. The Law School is part of Columbia University in the City of New York, a renowned interdisciplinary research institution with access to leading data scientists, programmers, sociologists, and jurists. Columbia adheres to a robust Equal Employment Opportunity policy which will govern the hire of all research assistants for this project.²⁰

Kellen Funk (cv enclosed) is Associate Professor of Law at the Law School and a legal historian with expertise in the development of civil institutions and procedures. His scholarship combines historical research methods with data science. His second book, *American Bail*, is in production. His work on a digital analysis of American procedure codes was published in the *American Historical Review* last year.

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¹ See Todd D. Minton & Zhen Zeng, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 248629, JAIL INMATES AT MIDYEAR 2014, at 3 (2015), <https://www.bjs.gov/content/pub/pdf/jim14.pdf>. For the most up-to-date figures drawn from a variety of sources, see Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html>.

² See *Pretrial Justice in America: A Survey of County Pretrial Release Policies, Practices and Outcomes*, PRETRIAL JUST. INST. 2, 7 (2010), <https://university.pretrial.org/viewdocument/pretrial-justice-in-1>.

³ See Bernadette Rabuy & Daniel Kopf, *Detaining the Poor: How the Bail Perpetuates an Endless Cycle of Poverty and Jail Time*, PRISON POL'Y INITIATIVE (May 10, 2016), <https://www.prisonpolicy.org/reports/incomejails.html>.

⁴ Zerline Hughes & Adwoa Masozi, "Release: The Bail Bond Industry is for Profit, But Not For Good," Justice Pol'y Inst. (Sep. 18, 2012), <http://www.justicepolicy.org/news/4389>.

⁵ See, e.g., PEW CHARITABLE TRUSTS, *How Debt Collectors Are Transforming the Business of State Courts* (May 2020), <https://www.pewtrusts.org/en/research-and-analysis/reports/2020/05/how-debt-collectors-are-transforming-the-business-of-state-courts>.

⁶ See, e.g., April Simpson, "New Laws Help Rural Black Families Fight for Their Land," PEW Stateline (Jun. 18, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/06/18/new-laws-help-rural-black-families-fight-for-their-land>.

⁷ See Crystal Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399 (2017).

⁸ See John F. Duffy & Richard M. Hynes, *Asymmetric Subsidies and the Bail Crisis*, U. CHICAGO L. REV. (forthcoming).

⁹ See Jessica Silver-Greenberg & Shaila Dewan, "When Bail Feels Less Like Freedom, More Like Extortion," N.Y. Times (Mar. 31, 2018), <https://www.nytimes.com/2018/03/31/us/bail-bonds-extortion.html>.

¹⁰ See *Selling Off Our Freedom: How Insurance Corporations Have Taken Over Our Bail System* 14, COLOR OF CHANGE & AM. CIVIL LIBERTIES UNION (May 2017), <https://www.aclu.org/report/selling-our-freedom-how-insurance-corporations-have-taken-over-our-bail-system>

¹¹ Local bail bond companies are, in turn, secured by large commercial "surety" companies—akin to insurance conglomerates—who can pay the full amount as a last resort. *Id.* at 11.

¹² UNITED STATES CENSUS BUREAU, "City and Town Population Totals: 2010-2019" (May 7, 2020), <https://www.census.gov/data/tables/time-series/demo/popest/2010s-total-cities-and-towns.html>

¹³ Timothy Schnacke, *The Third Generation of Bail Reform*, in Nat'l Ctr. for State Courts, FINES, FEES, AND BAIL PRACTICES: CHALLENGES AND OPPORTUNITIES (2017): 8-13.

¹⁴ See, e.g., Jeff Coltin, "How New York Changed Its Bail Law," City & State (Apr. 4, 2020); Gabrielle Banks, "Federal Judge Gives Final Approval to Harris County Bail Deal," Houston Chronicle (Nov. 21, 2019), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Federal-judge-approves-Harris-County-bail-deal-14853781.php>; Kellen Funk, "The Present Crisis in American Bail," 128 YALE L. J. FORUM 1098 (2019); Alec Karakatsanis, "Americans Aren't Supposed to Be Jailed Before Trial Just Because They Can't Make Bail. But It Happens All the Time," TIME (Dec. 16, 2019), <https://time.com/5749542/cash-bail-impact>.

¹⁵ Jennifer Gonnerman, "Before the Law," New Yorker (Oct. 6, 2014), <https://www.newyorker.com/magazine/2014/10/06/before-the-law>; Margaret Talbot, "Watching Sandra Bland," New Yorker (Jul. 29, 2015), <https://www.newyorker.com/news/daily-comment/watching-sandra-bland>.

¹⁶ See, e.g., Silver-Greenberg & Dewan, *supra* note vi; *Selling Off Our Freedom*, *supra* note vii; Shane Bauer, "Inside the Wild, Shadowy, and Highly Lucrative Bail Industry," Mother Jones (May/June 2014), <https://www.motherjones.com/politics/2014/06/bail-bond-prison-industry>; Spike Bradford, *For Better or For Profit: How the Bail Bonding Industry Stands in the Way of Fair and Effective Pretrial Justice*, JUST. POL'Y INST. (Sep. 2012), <http://www.justicepolicy.org/research/4388>.

¹⁷ See Jenny E. Carroll, *Pretrial Detention in the Time of COVID-19*, 115 NW. U. L. REV. ONLINE 59 (2020), <https://northwesternlawreview.org/articles/pretrial-detention-in-the-time-of-covid-19/>.

¹⁸ Nick Wing, “New Mexico Votes to Reform Bail System That Jails People Just Because They’re Poor,” HuffPost (Nov. 8, 2016), https://www.huffpost.com/entry/new-mexico-amendment-1_n_5817a3cfe4b0990edc32ed05; Carol A. Clark, “New Mexico Supreme Court Issues New Procedural Rules Governing Pretrial Detention and Release,” Los Alamos Daily Post (Jun. 5, 2017), <https://ladailypost.com/new-mexico-supreme-court-issues-new-procedural-rules-governing-pretrial-detention-and-release>.

¹⁹ Lisa W. Foderaro, “New Jersey Alters Its Bail System and Upends Legal Landscape,” N.Y. Times (Feb. 6, 2017), <https://www.nytimes.com/2017/02/06/nyregion/new-jersey-bail-system.html>.

²⁰ Available at <https://eoaa.columbia.edu/>.