



## Essay

# Who Will Make Bail for Taxpayers?

BY RORY LANCMAN AND MOLLY COHEN

Our city deserves a bail system that not only ensures that defendants return for court appearances, but that does not punish people for their poverty, is not racially discriminatory, does not distort case outcomes and runs efficiently.

We're not there yet, and much of the blame belongs to the de facto underutilization of our bail statute by everyone involved—the Criminal Justice Agency, prosecutors, defense counsel and courts. While only 7 percent of defendants fail to appear at an appointed hearing or trial date, or voluntarily within 30 days thereafter,<sup>1</sup> the cost is extraordinary to poor defendants, to minority defendants, to taxpayers and to the criminal justice system as a whole.

Consider these figures: in the 23,000 non-felony cases where bail was set in 2013, nearly 16,000 (69 percent) had bail set at \$1,000 or less. 87 percent of these defendants were unable to pay this modest sum at arraignment, and 46 percent never made bail at all. Those who were able to make bail spent a median of five days at Rikers Island—even though 44 percent of pretrial detainees will be acquitted, have their cases dismissed or receive a sentence without any jail time (not even time served).<sup>2</sup> Black and Hispanic defendants were more likely to be detained at arraignment (remanded without bail, or be unable to make bail) than white defendants,<sup>3</sup> and black and Hispanic residents comprised 89 percent of pretrial detainees held on bail of \$1,000 or less.<sup>4</sup>

Defendants detained pretrial are nearly twice as likely to be convicted, are less likely to have charges reduced and are more likely to be sentenced to prison.<sup>5</sup> And pretrial detention is massively expensive: it costs nearly \$170,000 to detain an inmate for one year on Rikers Island<sup>6</sup> and approximately

\$125 million a year to incarcerate defendants unable to pay bail.<sup>7</sup>

Bail's impact on the nightmare known as Rikers Island is extraordinary, and it comes at a moment when a central goal of New York City government, of both the mayor and the city council, is to reduce the number of inmates on Rikers Island.<sup>8</sup> Last year, the mayor established the Task Force on Behavioral Health and the Criminal Justice System with the primary goal of reducing the number of mentally ill inmates at Rikers Island.<sup>9</sup> This year the mayor and Chief Judge Jonathan Lippman announced

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“Project Reboot,” which aims to reduce by half the backlog of over 1,500 cases pending for over a year while defendants stew on Rikers.<sup>10</sup>

These efforts are a start, but bail forms the shaky foundation on which Rikers Island rests. According to the Department of Corrections, on any given day about 78 percent of Rikers' approximately 10,000 inmates are pretrial detainees. Of the approximately 72,700 admissions to Rikers Island in 2014, 53 percent of inmates (about 38,000) were detained solely because they couldn't pay bail; 14 percent (about 10,000) couldn't pay bail of \$1,000 or less—and about 3,400 couldn't pay bail of \$500 or less.<sup>11</sup>

In most jurisdictions, the decision to either (1) release the defendant, whether

outright “on his own recognizance” (ROR) or on a form of bail which the defendant would forfeit if he fails to appear, or (2) remand the defendant to custody, is made with two interests in mind: ensuring the safety of the public, and ensuring that the defendant appears in court to answer the charges. New York is one of only four states,<sup>12</sup> however, where the statute does not allow the court to consider “public safety” or dangerousness in making a bail decision, except to a limited degree in domestic violence cases.<sup>13</sup>

Before arraignment, the Criminal Justice Agency (CJA), a non-profit organization funded by the city, interviews the defendant to evaluate flight risk by asking questions about the defendant's current living conditions, employment and educational status, and criminal history (prior bench warrants, other open cases)—all factors which CJA's research shows have a strong empirical relationship with the likelihood of a defendant's appearance.

CJA uses the interview results to calculate a numerical score for each defendant and provide a release recommendation: (1) recommended for ROR; (2) moderate risk for ROR; (3) not recommended for ROR; and (4) no recommendation (for example, CJA does not provide recommendations for those who are charged with murder, attempted murder or escape).

Armed with CJA's recommendation, and the prosecutor's and defense counsel's requests, the judge turns to a state bail statute that, on its face, enumerates nine factors for courts to consider, including one that allows the court to tailor its bail decisions to the “financial resources” of each particular defendant.<sup>14</sup>

But prosecutors, defense counsel and courts almost never inquire into a defendant's financial resources and ability to make

bail, and CJA only collects defendants' raw salary data without measuring or recommending an amount of bail that can actually be made. Additionally, the bail statute also fails to provide any guidance or requirement that bail be limited based on quantifiable ability-to-pay standards, and there are no court rules or regulations on the issue.

The bail statute also authorizes a number of different forms of bail that are likewise infrequently used.<sup>15</sup> These options permit defendants to secure release via cash or bonds, and these bonds may be secured, unsecured, or partially secured by the defendant or an obligor other than the defendant.<sup>16</sup>

Some of these forms of bail are highly accessible to indigent defendants. For example, an unsecured appearance bond allows a defendant to secure his freedom via written promise to pay the bail amount should he fail to appear; in other words, without putting money up front that a defendant might not have. Similarly, a partially secured bond requires a defendant to only deposit a fraction of the amount, up to 10 percent, of the bail up front.

Nonetheless, judges in New York City almost always require either cash or commercial bond, two of the most onerous types of bail, and defense counsel (and prosecutors) rarely suggest other forms. A sample of bail decisions from 2005 compiled by the Criminal Justice Agency found that 15 percent of releases were in the form of commercial bond and the rest were cash. Other forms of bail were used rarely, if ever.<sup>17</sup> Similarly, though judges may designate the amount without specifying the form, which allows bail to be posted as an unsecured bond, this is seldom done.<sup>18</sup> In practice, New York's expansive bail statute is narrowed significantly in the courtroom, leaving infrequently used a wide variety of less onerous, more equitable options.

### Bail Alternatives

The city is looking to broaden the bail paradigm by expanding two promising models for ensuring a defendant's appearance at trial without the use of monetary bail. The first is supervised release, modeled after the federal system and currently run by CJA and the Center for Court Innovation, which the de Blasio administration has announced plans to triple to 3,400 slots. These supervised release programs have successful

completion rates in the 85 percent range,<sup>19</sup> but also unacceptably high rearrest rates hovering around 25 percent, albeit mostly for low-level, quality of life offenses or minor misdemeanors.<sup>20</sup>

The second model is a privately operated "bail fund," operated pursuant to the state's 2012 Charitable Bail Organization Law, which allows not-for-profits to post bail in misdemeanor cases where the bail is \$2,000 or less.<sup>21</sup> Two such bail funds operate in New York City: the Bronx Freedom Fund, which has a 98 percent success rate,<sup>22</sup> and the Brooklyn Community Fund, which was started too recently to have data on appearances. The City Council is looking to expand these programs by leveraging the expertise and relationships of service providers who can deliver high completion results at low cost.

But as promising as these alternative programs are, there is more work to do, and each actor in the system can make an immediate impact on our unfair, counterproductive and wasteful bail system. CJA should revise its intake interviews to identify parameters for realistic bail amounts, where bail is recommended at all. Defense counsel (and yes, prosecutors, too) should make bail requests, both in amount and in type, that are individually suited to the defendant's financial resources. And courts must utilize all available tools, including the nine factors in the bail statute, and all forms of bail, to ensure that no defendant otherwise eligible for release on bail is detained due to inability to afford the financial conditions of their freedom.

The Legislature has provided the tools, indeed the mandate, to build a more equitable bail system. The city, its taxpayers and our justice system can't afford for us not to use them.

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2. Mary Phillips, New York City Criminal Justice Agency, "Pretrial Detention and Case Outcomes, Part 1: Nonfelony Cases" at 59 (2007) [www.nycja.org](http://www.nycja.org)

3. Besiki Kutateladze et al. Vera Institute of Justice, "Race and Prosecution in Manhattan," Vera report at 3 [www.vera.org](http://www.vera.org)

4. Jamie Fellner, Human Rights Watch, "The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City," 48 (2010)

5. CJA, A Decade of Bail Research, at 116, 118

6. The City of New York Independent Budget Office, "New York City by the Numbers" <http://ibo.nyc.ny.us/cgi-park2/?p=516>

7. The City of New York Independent Budget Office,

Letter to Council Member Melissa Mark-Viverito, Sept. 11, 2014. [www.ibo.nyc.ny.us/iboreports/pretrialdetain-neptrsept2011.pdf](http://www.ibo.nyc.ny.us/iboreports/pretrialdetain-neptrsept2011.pdf)

8. Michael Schwirtz and Michael Winerip, "New Plan to Shrink Rikers Island Population: Tackle Court Delays," *The New York Times*, April 13, 2015. "There is rare consensus among inmate advocates and correction officials that the surest way to fix the Rikers Island jail complex is to empty it." *New Plan to Shrink Rikers Island Population: Tackle Court Delays*, by Michael Schwirtz and Michael Winerip, *N.Y. Times*, April 13, 2015

9. Mayor's Task Force on Behavioral Health and the Criminal Justice System: Action Plan 2014, pg. 5

10. "Fixing Rikers Island," Martin F. Horn, *The Marshall Project*, Jan. 21, 2015

11. Information from DOC, obtained June 9, 2015. The Criminal Justice Agency calculates the data differently, finding the problem to be even more acute: in 2013 for alleged misdemeanants, 17 percent (about 13,500) were held due to bail of \$1,000 or less, and about 6,300 misdemeanants were held due to bail of \$500 or less. CJA Annual Report, 1013 Exhibit 18. Admissions figures from Department of Corrections, Mayor's Management Report, FY2013, 20 (2014) available at <http://www.nyc.gov>

12. CJA, A Decade of Bail Research, at 25

13. C.P.L. §510.30(2)(a)

14. C.P.L. §510.30(2)(a)(iv)

15. C.P.L. §520.10(2)(b); *People ex rel. McManus v. Horn*, 18 N.Y.3d 660 (2012)

16. C.P.L. §520.10

17. CJA, A Decade of Bail Research, at 32, 82

18. CJA, A Decade of Bail Research, at 42, n. 22

19. Mary Phillips, New York City Criminal Justice Agency Annual Report 2013, 2 (2014) available at <http://nycja.org>

20. Mari Curbelo et al. New York City Criminal Justice Agency, Research Brief No. 32, May 2013

21. New York Insurance Law Article 68 § 6805

22. Bronx Freedom Fund: One Year Report, November 2014.

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