Insights into the Bail Reform Debate

An Essential Guide

The Bail Industry: The Grease that Keeps the Criminal Justice System Moving

Getting people out of jail is only a small part of the job of a private surety bondsman. Bail bondsman evaluate the risk of someone running every time a bond is posted because if the defendants runs and does not come back, the private surety has to pay the face amount of the bond to the county. Therefore, the private surety also provides supervision for defendants requiring that they check in weekly either by phone or in person.

Additionally, the private surety gets family members involved in reinforcing the importance that the defendant appears for each and every court appearance. On occasion, if the defendant needs a ride to court, the private surety provides it. If the defendant fails to appear for a court hearing, the private surety immediately begins searching for the defendant so that the criminal case can get back on track as soon as possible.

> ***"The private surety bondsmen of Texas have the lowest failure to appear rate of any other type of pretrial release system."***

Some people think that the bail industry simply lets people out of jail. Others think that the bail industry does the complete opposite and keeps people in jail. The reality is that the bail industry is what keeps the system moving. It's like the grease lubricating an engine, the bail industry is the lubricant of the criminal justice system that not only facilitates people's release from custody, but also at the same time, it ensures that persons appear at court appearances. When people show up for court, cases can move smoothly through the process. When people do not show up for court, the system stalls out and no one receives justice.

Below is an explanation of how and why someone is released through a financially secured bond.

- A magistrate sets a bond amount pursuant to article 17.15 of Texas Code Criminal Procedure
- The defendant/family contacts a bail agent to help them bail out
- The defendant/family puts up (on average) 10% of the bond amount as a non-refundable premium
- The bond is posted with the jail.
- The defendant is released from custody.

Our friends seeking change do not argue that the system they propose will be better. Instead, they argue that there are some studies that say the private industry is better and others that say that their system is just as good. However, the lessons from the last two years demonstrate that the private surety system is the best at keeping the Criminal Justice System moving forward. Nothing else comes close.

The bail industry provides many benefits to the state of Texas and its city and county governments. Very often these important benefits go unnoticed by decision makers. They include but are not limited to:

Supporting a Strong Texas Economy

The private bail industry is made up of hundreds of small family businesses that employ thousands of people all over the state. Additionally, many of those small businesses are woman and minority owned. In addition to having a wide range of diversity, many bail agents have strong backgrounds in the military and/or in law enforcement and they all are strong supporters of a robust and accountable criminal justice system in Texas.

The Texas Private Surety Bail System Contributes Significant Revenues to Texas's General Fund, County Budgets and other State Programs

- The Private Surety Bonding Industry pays personal property taxes for their offices
- Forfeiture payments ($25 million annually)
- Court costs associated with forfeitures ($3 million annually)
- Premium taxes paid by insurance companies
- State posting fees - $15 per bond (approximately $7.2 million annually)

> ***"The private bail industry ensures over 6.8 million court appearances every year."***

All these fees are utilized by the state, county and local governments. For example, 2/3 of the revenue from posting fees are deposited into the Prosecutor Longevity Fund which is used to hire additional prosecutors around the state and 1/3 of the posting fees are deposited into the Fair Defense Account to provide criminal defense representation for the poor. Overall, the private bail industry contributes over $40 million each year to the economy of the state of Texas.

Ensuring Victims Get a Chance at Justice

By ensuring that defendants go to court, the bail industry ensures that victims of crime get a real chance at justice. With just over 700,000 bonds posted each year, Texas' private bail industry ensures over 6.8 million court appearances. In doing so, they also ensure that close to 700,000 victims got a chance at justice.

Holding Criminals Accountable

When defendants are released on a financially secured bond, they are much more likely to show up for court. It has been proven time and time again that by involving family members and other social connections of the defendant in the underwriting process, and requiring them to participate financially, the likelihood of appearance increases substantially. In this way, the private bail industry holds more accused criminals accountable. In many ways, the private surety industry, in working with families, is sometimes the last chance for many arrestees to become productive citizens.

Additionally, if a defendant decides to flee the county, the state or even the country, the private bail industry goes out and retrieves that defendant and brings them back to Texas to face justice. This retrieval is done at no cost to taxpayers.

> ***"The private bail industry ensures close to 700,000 victims get a chance at justice every year."***

Private Surety Bail is Constitutional and it Works!

The United States Constitution expressly recognizes the constitutionality of private surety bail pursuant to the 8th Amendment to the Bill of Rights, which states that excessive bail shall not be required. U.S Const. amend. VIII.

The 5th Circuit has squarely rejected the argument that "the imposition of a financial condition of bail which a defendant cannot meet violates the eighth amendment." *United States v. McConnell, 842 F.2d 105, 107 (5th Cir. 1988).*

The Texas Constitution also expressly recognizes the constitutionality of private surety bail by stating that prisoners are bailable by "sufficient sureties." *Tex. Const. Art. I, Sec. 11.*

The United States Court of Appeals for the 5th Circuit recognizes that the use of bail schedules provides speedy and convenient release for those who have no difficulty in meetings its requirements. *Pugh v. Rainwater, 572 F.2d 1053 (5th Cir. 1978).*

When a county uses a bail schedule, a defendant who claims poverty must be given an opportunity within 48 hours of arrest to request a deviation from the schedule. *Cause No. 17-20333; ODonnell v. Harris County, 5th Cir., February 14, 2018 (ODonnell I).*

Once a county provides such a hearing, then the federal review is reduced to a rational basis review and ensuring that individuals appear for court hearings and trial is enough to satisfy this review. *Cause No. 18-20466; ODonnell v. Goodhart, 5th Cir., August 14, 2018 (ODonnell II). The 11th Circuit agreed with this analysis. See Cause No. 17-13139; Walker v. City of Calhoun, 11th Cir. August 22, 2018).*

Due Process and Equal Protection requires a hearing to ask for a deviation from the bail schedule. It does not authorize release even if the hearing is not held timely. In that case, the remedy is to notify the attorney for the defendant and the family that the required hearing was not held timely. *Cause No. 18-20466; ODonnell v. Goodhart, 5th Cir., August 14, 2018 (ODonnell II).*

Under Texas law, the trial court is required to consider several factors in determining the issue of bail and only one of these factors is ability to pay; therefore, the court must consider all of the statutory factors in setting bail and not put one (ability to pay) over the others. *Cause No. 18-20466; ODonnell v. Goodhart, 5th Cir., August 14, 2018 (ODonnell II); Tex. Code Crim. Pro. art. 17.15.*

An automated risk assessment has been proposed across the country as a remedy to individual magistration across the State of Texas. It was promised that this would take the guess work out of magistration. Proponents of bail reform tout them as the panacea to the ills in the criminal justice system. The reality is that these so called "evidenced-based tools" are turning out to be nothing more than pure junk science.

Over the past several months, there has been a growing consensus that risk assessments are "junk science." There have been numerous scholarly articles and whitepapers released on this very topic. Each of them come to the same conclusion: risk assessments have not been proven to work in the ways promised. Here are just a few quotes from some of these articles.

> *In sum, there is a sore lack of research on the impacts of risk assessment in practice. There is next to no evidence that the adoption of risk assessment has led to dramatic improvements in either incarceration rates or crime without adversely affecting the other margin.*
>
> Stevenson, *Professor of Law*, George Mason University (Dec. 2017).

> *An algorithm cannot take into account factors such as human emotion and need. It is stupid to allow a mathematical equation, the value of which is only as useful as the data it utilizes to operate, to determine the fate of a being that possesses free will. That's outright absurd, stupid, and dangerous.*
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> Wang, *Procedural Justice and Risk-Assessment Algorithms*, Yale University (2018).

> *In theory, risk assessments had good motivations behind them to reduce biases, but all they do is reproduce those biases in policing and prosecution. And more problematically, they give these instruments the gloss, the promise of not being biased, and they hide the bias that already constituted them.*
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> Werth, "Theorizing the Performative Effects of Penal Risk Technologies: (Re)producing the Subject Who Must Be Dangerous", Rice University (2018).

In addition to scholars, social justice advocates are now coming out against these algorithms as promoting racial injustice. Just recently over 100 civil rights groups banded together to oppose the use of risk assessments in the criminal justice system. In their public statement these groups said the following:

> *Pretrial risk assessment instruments are not a panacea for racial bias or inequality. Nor are they race-neutral, because all predictive tools and algorithms operate within the framework of institutions, structures, and a society infected by bias. Those facts weigh heavily against their use.*
>
> Press Release, *More than 100 Civil Rights, Digital Justice, and Community-Based Organizations Raise Concerns About Pretrial Risk Assessment*, (2018).

Additionally, other advocate groups have also publicly stated their distrust of computer algorithms in the criminal justice system.

> *Pretrial risk assessment instruments, as they are currently used, cannot safely be assumed to advance reformist goals of reducing incarceration and enhancing the bail system's fairness.*
>
> Koepke & Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, Washington Law Review (Forthcoming) (2018).

Most importantly, when it comes to risk assessments, the public is NOT in favor of their use. According to a national survey on the topic. "The public strongly disfavors algorithms as a matter of fairness, policy, and legitimacy."

Myths of Bail Reform

Much of the bail reform debate has been centered around misleading and inaccurate claims about jail populations and the bail industry. We think it is time to debunk these "myths" of bail reform.

Myth #1 - Poor people are languishing away in jail for the sole reason that they cannot afford a bail bond

Proponents for change argue that there is a significantly high number of individuals who are in jail preconviction and this number requires that changes be made. This number is misleading. Our friends seeking change do not review the numbers to see what percentage of the individuals in jail are "bailable," which is the number that could be bonded out of jail. Individuals who are being held pursuant to other warrants, blue warrants, probation violations or mental health holds are not eligible for a bond. Therefore, even under the changes proposed by our friends, these individuals would remain in jail.

Myth #2 - Jails are filled with low level, first time, nonviolent offenders who are not a flight risk and who pose no significant risk to the community

Over the past several years, many jurisdictions around the country have adopted "smart on crime" policies that have decriminalized many non-violent misdemeanor crimes. These changes to the laws have impacted the make-up of jail populations everywhere. No longer are low-level misdemeanor first time offenders being arrested and placed in jail. Instead, many of these low-level, non-violent misdemeanors are simply cited and released.

It is also important to keep in mind that judges always have the discretion to release a defendant on their own recognizance. More often than not, that is exactly what they do. However, judges are required to consider many factors in setting bail. These factors are set out in article 17.15 of the Texas Code of Criminal Procedure. Ability to pay is not the only factor that a court considers. It is one of the facts that also includes the defendant's criminal history and the potential impact on public safety. Tex. Code Crim. Pro. art. 17.15.

Myth #3 – Bail targets poor communities and promotes racism

The bail industry exists for the very reason that there are people who cannot afford to pay the full amount of the bond. If everyone could afford bail, there would not be a bail industry. When a family can't afford to pay the full amount of the bond, they can go to their local small business owner/bail agent and pay a small non-refundable fee (typically anywhere from 7-10% of the bond) and have their family member released.

In terms of the bail industry promoting racial disparity in the criminal justice system, this is just false. An article in the NY Times, by Adam Liptak, came to a much different conclusion. Liptak concluded that bail bond agents actually reduce the impact of racial bias in the criminal justice system. According to Liptak, if a judge sets a higher bond amount on a person of color, the bail agent eliminates that racial bias by providing steeper discounts to these individuals (*Can Bail Bond Dealers Reduce Discrimination? A Guest Post*).

Myth #4 - The use of money bail does not improve defendant appearance rates

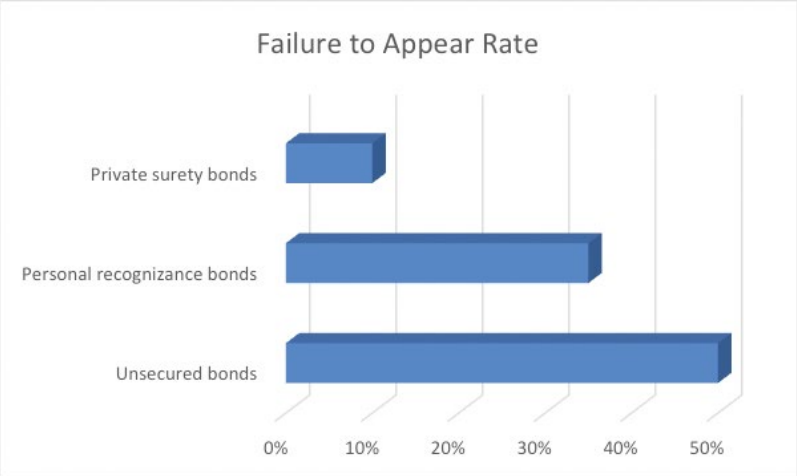
The proponents of change realize that if the private surety bail industry is better at getting people to appear for court, then this is a fatal argument to their proposals. The reason for this is why would the State of Texas spend millions of dollars on a new system that is worse than the status quo and which currently costs the state of Texas nothing. Therefore, our friends seeking change have to argue that their proposals are just as good as the current system. But this could not be further from the truth. Every legitimate third-party peer reviewed study shows that the use of financially secured release (bail) is the most effective way to ensure appearance of a defendant in court. This is not something new. Additionally, the jurisdictions that have sought to change have been faced with the cold stark reality that the proponents over promised their results as failures to appear have increased significantly.

Between 1990-2004, the Department of Justice conducted annual reviews of pretrial data in the top 75 most populated counties in the US. Each year the study was conducted the results were identical, release on a financially secured surety bond through a licensed bail agent was the most effective form of release. A study published in the Chicago Journal of Law and Economics showed defendants released on a surety bond are 28 percent less likely to fail to appear than similar defendants released on their own recognizance, and, if they do fail to appear, they are 53 percent less likely to remain at large for extended periods of time

In 2013, Dr. Robert Morris of the University of Texas at Dallas conducted a study taking a look at Dallas' pretrial release system. Dr. Morris determined that the cost of a failure to appear in that system was $1,775. Dr. Morris also determined the effectiveness of bail showing that those charged with a felony and released on a bail bond were 39%-56% more likely to show up for court. Those charged with a misdemeanor were 26%-32% more likely to show up. Based on those results, he was able to determine that the commercial bail industry saves Dallas County over $11 million annually by getting defendants to court (*Pretrial Release Mechanisms in Dallas County, Texas: Differences In Failure To Appear (FTA), Recidivism/Pretrial Misconduct, And Associated Costs Of FTA**, Dr. Robert Morris, 2014).

By the Numbers: A Case Study of Proposed Bail Reform - The Harris County Experience

Over the last two years, Harris County has been under a federal court order to impose many of the changes advocated by bail reform proponents. The Fifth Circuit recently reversed the district court's preliminary injunction which imposed these restrictions. However, the Harris County experience is very illuminating. Over the past 12 months, while the order was in effect, the county tracked the failure to appear rate for each type of release. Here are the results.



As you can see, those individuals who were released on a private surety bond through a bail agent appeared at a rate of 90%. Those released on unsecured bonds failed to appear 50% of the time. What does this mean? Harris County arrests approximately 1,000 misdemeanor individuals a week. If all of these individuals were given "unsecured bonds" then approximately 500 individuals every week would not appear for court and would have to be rescheduled for new hearings. The second week, you would now have 1,500 defendants to deal with. This includes the weekly 1,000 defendants plus the 500 who failed to appear the previous week. Based on the numbers, the estimated number of FTAs from that group would be 50% or 750 people. *See* data HERE and HERE.

> ***"Individuals released on a private surety bond through a bail agent appeared at a rate of 90%. Those released on unsecured bonds failed to appear 50% of the time."***

How did the proponents for change respond? They accused numerous Harris County elected officials and administrative employees of conspiring to falsify these numbers. The proponents for change argue that elected officials who have taken an oath to follow the constitution and administrative employees who are reporting the numbers from the computer system are lying.

What is the reason for this? Our friends have no other response because the numbers under their planned reforms are just that bad. The proponents can no longer hide them. The numbers are on display in all their glory demonstrating the great damage that has been done to the Criminal Justice System in Harris County over the last year.

These results are not an isolated instance. This is also the results that are being revealed more and more in New Jersey and other states that attempted similar reforms and are in the process of "undoing" them.

Should Texas Taxpayers be forced to pay to replace an extremely effective private sector business with a less effective taxpayer funded government program?

The Most Recent Report from the Office of Court Administration seeks funding of over a billion dollars to fund a state-wide PR office to do what the Private Industry already does at no cost to the taxpayers of Texas.
For More Information Click HERE.

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