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Does No Cash Bail Make Any Sense?

By Joel Cohen

When the community is potentially at risk if a particular defendant is released, even if the pending crime charged is relatively low-level, it makes little sense to totally remove discretionary power relating to a defendant's release from the judge (aside from empowering him to impose monitoring or travel restrictions).

This won't happen to you. So try to imagine. Your wife or minor child needs medicine—they're sick, weak. They're not eating and are dehydrated. You can't afford to go to the doctor and you can't get prescription drugs. But you need something to help them get better. So you go to the local drug store, take a large amount of drugs and a bunch of other products that will help them, and bury them under your clothes. Make no mistake, you "took" them because you simply can't afford them. But as you get to the checkout counter you have a change of heart and want to return the drugs to their shelves, but it's too late. A store security guard grabs and detains you and calls the police who arrest you. And maybe you've taken something far more expensive too.

Your $300 theft is a misdemeanor, and your potential jail sentence is one year imprisonment. A $1,200 theft, assuming it got that high, is a Class E felony, and you face a possible four years in jail (for which you could serve as much as 2/3 of that time). You have no job and, along with your family, you lack roots in the community where you "live"—if you can call it that.

When you're arraigned—that is, when you appear before a criminal court judge for the first time—the judge sets bail at $500 in cash. You have absolutely no assets. And, of course, you have no one who will stand up for you and post the $500 that seems like all the money in the world. It may as well be $500,000. You're held in jail until your case is over, or until someone comes forward to post bail (which is highly unlikely to happen).

Month after month goes by as your Legal Aid lawyer, dealing with hundreds of cases, talks to you before court appearances and tells you your chances to beat the case—which actually may be good. By now, it's six months that you've been languishing, and you appear before a different judge. She tells your lawyer *and you* that if you plead guilty *today*, she'll actually release you immediately, sentencing you to "Time Served!" Your incarceration is over.

You tell the lawyer that you're innocent and want a trial. He tells you that you won't get to trial for at least three months. And on the felony charge, assuming you were about to steal more than

$1,000 worth of items, you might conceivably serve 2 2/3 years. But here's the kicker: If you're acquitted, you will have served the extra three months for nothing, away from your family. The six months will have been in vain.

Brought to your knees by "the System" rigged against you because you—unlike the middle class kid arrested for stealing pharmaceuticals while pledging his college fraternity—couldn't afford bail, you give up your "principles." Simply to end the torment, you plead guilty to a crime, misdemeanor or Class E felony, that you believe to the depth of your soul you're innocent of. And maybe you are indeed innocent—having been pursued by a security guard who wouldn't let you simply put back the drugs you had hidden under your clothes, inasmuch as the guard was "getting even" with you for hanging out in the store during every cold spell.

Faced with the harsh reality that there are many truly innocent people who plead guilty rather than go to trial simply because they couldn't afford bail, the New York Legislature reformed the bail laws effective January 1st to provide that judges can no longer set cash bail for misdemeanors and Class E (lowest level) felonies, except primarily for sexually abusive conduct and violation of orders of protection in domestic violence cases. Bail cannot be set even if the arrestee has a history of not returning to court, even on the current case. This was intended to eliminate the disparity between defendants who can and can't afford bail—*everyone*, rich and poor, charged with those non-sexual, non-assaultive, crimes will be released pending trial without posting cash, albeit perhaps with certain monitoring procedures. It's virtually impossible for us to relate to this story even though it happens so often.

One can easily understand why a legislature would want to cure this problem. The question, though, today, is whether the New York Legislature has simply gone too far, as exhibited by the "poster child" case of Tiffany Harris. Harris is a Brooklyn woman who was charged and released *without bail* in late December after being accused of slapping three Orthodox Jewish women only to be rearrested (and released) the following day for slapping yet another woman. And given the recent spate of anti-Semitic attacks in New York City, it is unsurprising that the bail reform law that arguably enabled Harris's recidivism to thereby engage in the second assault—and we assume for these purposes that she's actually guilty—has come under strong attack, not only from prosecutors (and judges) who find themselves powerless to do anything about cases like Harris.

The problem is that the counter-reformers, for lack of a better term, would presumably want to throw the baby out with the bathwater. That is, because a system of "no cash bail" invariably will lead far too frequently to a *People v. Harris* scenario, they might argue that we simply need to return to what came before. That is, essentially, where detained defendants might not seek a trial or dismissal based on motion practice even when they are actually innocent.

Clearly, this new legislation seems far too lenient in favoring pre-trial release, even in the face of past injustices where truly innocent people have pleaded guilty. Society fundamentally recognizes the critical role that judges play in criminal justice. By eliminating the need for bail or, for example, "mandatory minimum sentences" (on the other end of the spectrum), we remove

discretion from judges who should be able to make important, case-specific, decisions that impact the defendants before them, along with the community. Yes, bail decisions—particularly whether a defendant poses a risk to the community—often must be made quickly given the oppressive calendars of judges. But when the community is potentially at risk if a particular defendant is released, even if the pending crime charged is relatively low-level, it makes little sense to totally remove discretionary power relating to a defendant's release from the judge (aside from empowering him to impose monitoring or travel restrictions).

In the opening hypothetical, if the pre-2020 defendant was released without bail, rather than with bail set at $500, the defendant might, indeed, fail to return to court for his next appearance. Yes, that is an unfortunate consequence for a more balanced way to address pre-trial release generally. But suppose our "pharmaceutical thief" was a repeat offender—he stole pharmaceuticals several times and jumped bail previously, or engaged in trespass conduct on another occasion. Should the justice system's arms be tied behind its back in dealing with him? Or shouldn't a judge be empowered to use common sense to decide if this defendant should be required to post cash bail to ensure his return to court or that he doesn't pose a threat to the community?

We should all be for a justice system that grants most criminal defendants the right to pre-trial release, irrespective of their economic circumstances—as long as they are likely to return to court and don't present a potential threat to the community. But does it make any sense that a duly appointed or elected arraigning judge, having no discretion whatsoever, *must* release him without the requirement of bail altogether? In the New York Daily News on Jan. 15, 2020 former Chief Assistant District Attorney of New York County, **Daniel Alonso**, in a column well worth reading, makes pellucidly clear that in "must release" cases, a judge when arraigning a defendant and releasing him simply can't consider the defendant's bench warrant history, lack of community ties, aliases, immigration status, etc.—even if with a long arrest record the defendant has absolutely never returned to court. Do we want that state of affairs to continue?

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