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Heaton, Mayson and Stevenson: Bail system is unjust and undermines public safety

By Paul Heaton, Sandra Mayson and Megan Stevenson | August 18, 2016

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Photo: Brett Coomer, Staff

Research shows that 2 in 3 of the poorest defendants in Harris County were in jail due to the inability to post small amounts of bail.

In Arthur Miller's famous play, "The Crucible," based on the Salem witch trials, the hero, John Proctor, is a flawed yet honest farmer who faces an excruciating choice - falsely confess to practicing witchcraft, which will win his freedom, or maintain his integrity and proclaim

innocence, leading to certain execution. Although we like to think we've developed a modern criminal justice system that prevents such dilemmas, in some respects we may not have come as far as we'd hope.

Case in point: the Harris County misdemeanor criminal justice system, which processes tens of thousands of defendants each year. To ensure defendants show up for court and deter pretrial crime, Harris County assigns cash bail to nearly all criminal defendants, even those accused of very minor non-violent crimes. While such cash bail systems have gained widespread acceptance, in actual practice Harris County's misdemeanor bail system discriminates against poor defendants, encourages wrongful confessions, and increases convictions at considerable human and taxpayer cost.



New research from the University of Pennsylvania's Quattrone Center demonstrates that, since 2008, 2 in 3 of the poorest defendants in Harris County were kept in jail due to the inability to post even small amounts of bail (\$500). This is double the rate of incarceration for the wealthiest defendants, and the gap persists even after accounting for differences in defendants' charged offenses and criminal histories. Those held pending trial often face a choice not unlike John Proctor's - take a guilty plea and go home with a sentence of time served, or maintain one's innocence at the cost of sitting in jail until the next court date. Because of these skewed incentives, detainees are 25 percent more likely to plead guilty than similar defendants who make bail, and receive jail sentences more than twice as long. Over the past six years, this system of de facto detention has resulted in thousands of new convictions and added nearly 400,000 days served in the county's overcrowded jails. Most troubling of all, the data shows that contrary to our goals, detention leads defendants to commit more crime, undermining public safety instead of promoting it.

It would be easy to blame incompetent defense attorneys, overzealous judges or prosecutors, or the bail bondsmen's lobby for these problems, but doing so would be

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misguided. All of the actors in the criminal justice system may be operating with good intentions. Few defendants have representation in bail hearings, in part to save taxpayer dollars. Judges rely heavily on a bail schedule applied in assembly-line hearings to process cases quickly, lest delays develop that extend pretrial detention even longer. Prosecutors offer time-served plea deals to get low-level offenders home sooner, and defense lawyers are reluctant to counsel clients to prolong their jail stays. Defendants are desperate to escape jail, and may underestimate the housing, custody, employment and immigration problems that can result from a conviction. Each portion of the system acts logically given its constraints, but the system as a whole fails to protect the constitutional rights of defendants or fully serve the interests of the community.

To their credit, the criminal justice community has taken steps to improve this situation. The county will undertake a pilot program that will provide public defenders to some defendants at bail hearings, which should provide better information to prevent detaining low-risk individuals unnecessarily. With support from the MacArthur Foundation, the county is implementing a new pre-trial risk assessment questionnaire, enabling judges to make more evidence-based bail determinations, and expanding pretrial diversion programs that allow defendants to avoid convictions with good behavior. Extending these reforms to include more defendants charged with misdemeanors is warranted.

Beyond these reforms, Harris County and jurisdictions nationwide need to consider whether it makes sense to hold so many individuals who are presumed innocent and accused of minor, non-violent crimes. In the mid-1990s, Washington D.C. reduced its reliance on cash bail. Today, D.C. experiences low rates of pretrial offending and high appearance rates despite releasing 4 in 5 defendants. While these days many are skeptical of what goes on in D.C., in this instance, the



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nation's capital is setting a good example that Harris County should follow. Releasing more misdemeanor defendants on personal bond is that rare public policy that benefits everyone - it could help to alleviate jail overcrowding, save taxpayer money and improve public safety.

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