

When Bail Is Out of Defendant's Reach, Other Costs Mount

By [SHAILA DEWAN](#) JUNE 10, 2015

BALTIMORE — Dominick Torrence, who has lived in this city all his life, has a long rap sheet for dealing drugs but no history of violence. So when he was charged with disorderly conduct and rioting on April 28, a night of unrest after Freddie Gray was fatally injured in police custody, he was shocked to learn the amount he would need to make bail: \$250,000, the same amount as two of the officers facing charges over Mr. Gray's death.

Although a bail bondsman would charge only a fraction of that, normally 10 percent, for many defendants \$25,000 is as impossible a sum as \$250,000. "That's something you get for murder or attempted murder," Mr. Torrence, 29, said from Baltimore Central Booking. "You're telling me I have to take food out of my kid's mouth so I can get out of jail."

He spent a month in jail on charges that would later be dropped.

Defense lawyers, scholars and even some judges say the high bail amounts set for some Baltimore protesters highlight a much broader problem with the nation's money-based bail system. They say that system routinely punishes poor defendants before they get their day in court, often keeping them incarcerated for longer than if they had been convicted right away.

"It sets up a system where first there's the punishment, and then there's the opportunity to go to court for trial," said Paul DeWolfe, the Maryland state public defender.

Though money bail is firmly entrenched in the vast majority of jurisdictions, the practice is coming under new scrutiny in the face of recent research that questions its effectiveness, rising concerns about racial and income disparities in local courts, and a bipartisan effort to reduce the reliance on incarceration nationwide.

Colorado and New Jersey recently voted to revamp their bail systems, while in New Mexico last November, the State Supreme Court struck down a high bail it said had been set for the sole purpose of detaining the defendant.

This year, the Department of Justice weighed in on a civil rights lawsuit challenging bail amounts based on solely on the charge, calling them unconstitutional. In several states, including Connecticut, New York and Arizona, chief justices or politicians are calling for overhauls of the bail system.



Markeisha Brown, 25, in the home she shares with Dominick Torrence and her two sons in Baltimore. While Mr. Torrence was incarcerated with bail set at \$250,000, Ms. Brown had to stop working and drop out of school. Credit Jonathan Hanson for The New York Times

The money bail system is supposed to curb the risk of flight by requiring defendants to post bond in exchange for freedom before trial. But critics say the system allows defendants with money to go free even if they are dangerous, while keeping low-risk poor people in jail unnecessarily and at great cost to taxpayers.

For those who cannot afford to post bail, even a short stay in jail can quickly unravel lives and families. Criminal defendants are overwhelmingly poor, many living paycheck to paycheck, and detention can cause job losses and evictions. Parents can lose custody of their children and may have a difficult time regaining it, even when cases are ultimately dropped. And people in jail who are not guilty routinely accept plea deals simply to gain their freedom, leaving them with permanent records.

The United States leads the world in the number of pretrial detainees, according to a [report](#) by the National Institute of Corrections, an agency of the Department of Justice. An estimated half a million people are in the country's jails on any given day because they cannot make bail. And even bail amounts much lower than those routinely seen in Baltimore can be prohibitive.

On a single day in New Jersey, [one study found](#), more than 1,500 defendants were in jail because they could not come up with \$2,500 or less. Mainstream groups including the American Bar Association recommend that money bail be used only as [a last resort](#).

Yet judges continue to rely on money bail, calling it a flawed but crucial tool. Some say that commercial bail bondsmen are better than law enforcement agencies at getting defendants to court, and cost taxpayers less, and that the number of defendants who cannot afford bail is overstated. “Bail probably is the single most reliable assurance that somebody will show up,” said Judge Steve White, president of the Alliance of California Judges.

Changes to the money bail system have been hard to achieve, in part because bail is set by magistrates and judges under little scrutiny in thousands of local courtrooms, each with its own rules and customs. Baltimore, with more than 50,000 arrests each year, may be as good a place as any to observe the often punitive impact of money bail on low-income defendants.

By the time Mr. Torrence was released from jail, for instance, his imprisonment had taken a toll on the family he shares with his girlfriend, Markeisha Brown. Since Mr. Torrence normally takes care of Ms. Brown’s two sons, she was forced, she said, to stop working and drop out of cosmetology school, losing the \$18,000 she had borrowed on a [student loan](#). The couple are still trying to come up with June’s rent.

Higher Sums

On April 30, Mr. Torrence appeared in court via a video link for a review of his bail, initially set at \$75,000. His lawyer, Todd Oppenheim, said that at the time of his arrest, Mr. Torrence had simply been walking home, and that the police statement did not describe any specific actions he had taken.

But the prosecutor, David Chiu, said Mr. Torrence had been spotted from a helicopter throwing rocks and bricks at firefighters. “They didn’t have the manpower just to arrest random people for general acts of violence,” Mr. Chiu said. “They were only detaining people who could be identified and apprehended.”

Mr. Torrence’s record and, in particular, several missed court dates in his past worked against him. The judge, Barbara Waxman, citing both the severity of the charges and the failures to appear, raised the bond to \$250,000.

Four weeks later, prosecutors dropped the case for lack of evidence.

In the legal sense, the word “bail” refers to release before trial. The practice of requiring money to be posted before release did not become widespread until the 20th century. The United States Supreme Court has ruled that although the American presumption of innocence has inherent risks, “Liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”

Bail conditions are not supposed to be punitive. They are supposed to impose as little restriction as is needed to reasonably ensure that a defendant appears in court.

In practice, though, Baltimore public defenders say, judges here assume the defendant is guilty when setting bail, a particular problem in areas where the police focus disproportionately on African-Americans and when they bring charges backed by thin evidence. In the protests spurred by Mr. Gray's death, almost 500 adults were arrested. Fewer than 200 were charged with a crime.

A spokeswoman for the Maryland courts declined to make any judges available for an interview, saying they were prohibited from discussing their deliberations. But other judges acknowledged the defense lawyers' point.



Michael Littlefield was in jail for more than four months in Chilton County, Ala., unable to make a bail set at \$100,000 on a charge of manufacturing methamphetamine. The grand jury, which meets only twice a year, ultimately did not indict him. Credit Caleb Chancey for The New York Times

“The bail is really being set to keep the person in custody. You have to kind of concede that,” said a California judge, W. Kent Hamlin of Superior Court in Fresno County. “It’s not supposed to be that; it’s supposed to guarantee their appearance in court. They’re innocent until proven guilty, but the bail system assumes they’re guilty.”

At another recent bail hearing in Baltimore, a young man with no prior convictions had been picked up on a year-old warrant for allegedly damaging his mother's screen door and threatening to burn her house down. The mother came to court, prepared to testify that she had never complained of such an incident and that she did not even have a screen door. But the judge declined to let her speak, setting bail at \$2,500 with a 10 percent cash deposit required, more than the family could afford.

At another hearing, a 26-year-old man, also with clean record, was charged with breaking into a house and attacking his sister. His lawyer said that the man actually lived in the house, and that the sister, who was mentally ill and had since been arrested on an attempted murder charge, had recanted her story to police. The judge set bail at \$75,000.

Detention based on questionable evidence is not limited to Baltimore. In Chilton County, Ala., where a grand jury meets only twice a year, Michael Littlefield sat in jail for more than four

months on a charge of making methamphetamine, his bail set beyond his reach at \$100,000. The evidence against him, he said, was found in a garbage truck that picked up trash in front of his girlfriend's house. The grand jury declined to indict him.

In at least one of the Baltimore protest arrests, the judge was presented with abundant evidence. Images of Allen Bullock, 18, damaging police cars had been front-page news "He was out of control and he's a threat to public safety," said Judge Kathleen M. Sweeney of Maryland District Court, leaving his bail at \$500,000. "There is no way that I can guarantee public safety, should he make bail."

Nonetheless, on May 7 Mr. Bullock was released, his bond posted anonymously.

Buying Freedom

Mr. Bullock's case illustrates the problem with money bail, in its critics' view. No amount of money, they say, should buy the freedom of someone who is truly dangerous. By the same token, the inability to pay should not keep defendants who pose little risk locked up. Instead, they should be released using a range of nonfinancial conditions like GPS monitors, pretrial supervision (similar to probation), or even unsecured bonds. With unsecured bonds, a defendant is released without having to pay but owes money if he or she fails to appear in court.

The critics say risk should be evaluated not in a quick, subjective hearing, but rather through a scientifically validated assessment that weighs such factors as the defendant's age, lifestyle and previous record. The use of risk assessments is also supported by law enforcement groups that include the National Sheriffs Association and the Association of Prosecuting Attorneys.



Allen Bullock, 18, was arrested and accused of damaging a Baltimore Police car when protests turned violent in the days after Freddie Gray's death in April. A judge set Mr. Bullock's bail bond at \$500,000, which was posted anonymously in May. Credit Jim Watson/Agence France-Presse — Getty Images

As an example of a model system, advocates for change point to Washington, D.C., where money bail was effectively eliminated in the 1990s. About 15 percent of defendants are deemed too risky to release and are held on what is called “preventive detention.” Of the rest, very few fail to appear in court or are arrested on a new charge.

New Jersey is phasing in a system modeled on Washington’s, but elsewhere, change has been blocked. In Maryland last year, a pretrial reform committee appointed by the governor at the time, Martin O’Malley, issued a host of recommendations, including the use of risk assessments and the elimination of money bail. None have been adopted — in part, said Mr. DeWolfe, the public defender, because of opposition from the powerful bail bond industry.

[Equal Justice Under Law](#), a civil-rights group based in Washington, has been trying a novel legal tactic to dismantle money bail: going after jurisdictions that use bail fee schedules, in which the amount of bail is fixed based on the offense instead of the flight risk or public safety concerns resulting in the unconstitutional imprisonment of people solely because they cannot pay.

In one of the suits, against the town of Clanton, Ala., the federal Department of Justice filed a rare supporting brief, writing that setting bail in this fashion, and without regard for a defendant’s ability to pay, “not only violates the 14th Amendment’s Equal Protection Clause, but also constitutes bad public policy.”

Two cases in St. Louis County, the second one filed on behalf of a homeless man held for six days on a \$300 bond, have led to countywide talks about switching to unsecured bonds in all municipal courts, including Ferguson, Mo., whose court system’s treatment of poor black residents was the subject of a Department of Justice [report](#). The case was settled on June 3, when Velda City, Mo., agreed to stop using money bail.

The bail bond industry asserts that alternatives to money bail can be just as burdensome on the poor. Some jurisdictions charge defendants for ankle monitors or drug abuse classes, and a mistake can land them in more trouble, said Nicholas J. Wachinski, the executive director of the American Bail Coalition, an industry group. “I can’t tell you how many cases there are where they are exonerated of the underlying crime, yet they’re still going through the criminal proceeding of a technical violation of pretrial release,” Mr. Wachinski said.

Another problem is that many states do not give judges the option of preventive detention; in Baltimore, for example, it can be used only in very limited circumstances. So judges often do what Judge Sweeney did in Mr. Bullock’s case: set a very high, presumably unattainable bail.



William Cedric Wheeler was living in a minivan with his family on nights when they could not afford a cheap motel. Mr. Wheeler spent six weeks in jail last year when he was unable to pay a bail set at \$2,069.80. Credit Jonathan Hanson for The New York Times

Even judges who have seen bail-related horror stories say money bail is necessary. One Cleveland criminal court judge, Nancy Margaret Russo, said an infant died after being left in the care of the drug-addicted girlfriend of a defendant who could not come up with \$171 to make bond. But, the judge said: “You’re balancing risk. You can’t throw the risk out the window just because somebody doesn’t have any money.”

Long-Term Debts

For a \$75,000 bond in Baltimore, a commercial bondsman would typically charge 10 percent. Families typically have to scrape together 1 percent in cash, or \$750, then go on a payment plan for the other 9 percent, or \$6,750, more.

That is money they can never recover. Innocent or guilty, defendants can remain in hock to their bondsmen for years.

One 52-year-old woman said she had been falsely accused repeatedly of serious crimes including armed robbery and kidnapping by an abusive ex-boyfriend, a former police officer adept at using law enforcement to punish her. The last time he accused her, a public defender was able to win her release by demonstrating that the boyfriend had a pattern of making false accusations. But the woman, who lives on disability and food stamps, is still paying \$100 a month for a \$50,000 bond posted in 2012. All charges against her were ultimately dropped.

“I said, ‘Y’all know this man is lying, so why you keep picking me up?’” said the woman, who asked that her name be withheld to avoid provoking her accuser. “They said they had to, because one day it might be real.”

On a recent Thursday, William Cedric Wheeler met a visitor at the library in Waldorf, Md., where his children do their homework after school.

Mr. Wheeler, 39, was charged in 2009 with stealing from his employer of 12 years. He had no prior record and says he was innocent. But fearing that he would be sent to prison and separated from his children (he has six: two now in college, two who live with his ex-wife, and two who live with Mr. Wheeler and his wife), he made a plea deal and agreed to pay restitution of \$3,069.80.

The blot on his record made it hard to find a steady new job, and he fell behind on child support. His tax refunds were withheld, he said, once for child support and once for his wife’s [student loans](#). He managed to pay only \$1,000 toward the restitution. By 2012, he and his wife had finally found decent jobs working for a hotel company, but in November he suffered a stroke and his medical bills began to mount.

When his failure to pay finally caught up with him last year, he was arrested and the judge set his bail at \$2,069.80 — the same amount he had been unable to come up with in the first place. During the six weeks Mr. Wheeler spent in jail, he said, he lost his job, his family was evicted, one car was repossessed and the other one broke down. His family tried to hold bake sales to raise money for his bond, Mr. Wheeler said, but the police came asking if they had a license to sell food.

The couple and their children, Ayanna, 11, and Alijah, 9, were living out of a minivan on the nights when they could not afford a cheap motel room.

“Since I got locked up, this is all I have left,” Mr. Wheeler said, gesturing at a collection of packed bags, a laundry basket and a basketball in the back of the van. “This is everything that we own.”

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