BAIL SCHEDULES

A Violation of Judicial Discretion?

BY LINDSEY CARLSON

In the wake of World War II, and in the midst of the country's second "red scare," US marshals detained Loretta Starvus Stack and 11 other members of the California Communist Party and charged them with violating the Smith Act, the 1940 federal law that made it a crime to advocate or belong to a group that advocated the violent overthrow of the government. (*See* Stack v. Boyle, 192 F.2d 56 (9th Cir. 1951).) Each defendant was eligible for bail.

At the time, the only recognized purpose of bail was to ensure the defendant's appearance in court, and Federal Rule of Criminal Procedure 46(c) provided guidance to judicial officials in setting bail to effectuate that purpose. The rule stated that if a defendant was admitted to bail, "the amount thereof shall be such as in the judgment of the . . . court . . . will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant." (*Id.* at 5, n.3.) Rule 46(c) codified what the law has come to recognize as "individualized" bail determinations, or determinations that incorporate the personal characteristics of each defendant in order to arrive at appropriate pretrial release conditions.

In the case of Stack and her codefendants, the court initially set differing money bail amounts pursuant to what appeared to be individualized bail assessments: "Upon their arrest, bail was fixed for each petitioner in the widely varying amounts of $2,500, $7,500, $75,000 and $100,000."(*Id.* at 3.) However, because four persons previously convicted under the Smith Act had fled after being released on bail, the government moved to significantly increase the amounts of bail for all of the defendants. At a hearing on the motion, Stack and her codefendants provided, among other things, statements as to their family relationships, their financial resources,

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their health, and prior criminal records. Despite these statements and the fact that the government produced no contrary evidence, the judge set bail uniformly for all defendants in the amount of $50,000.

The US Supreme Court ultimately held that such blanket bail setting was improper, given the individualized criteria contained in Rule 46(c). In the seminal case of *Stack v. Boyle,* the court stated, "[b]ail set at a figure higher than an amount reasonably calculated to fulfill [the purpose of ensuring the presence of the accused] is 'excessive' under the Eighth Amendment." (*Id.* at 5.) The court further held that to "reasonably calculate" the appropriate bail for individual defendants, courts must conduct bail determinations "based upon standards relevant to the purpose of assuring the presence of that defendant. The traditional standards, as expressed in the Federal Rules of Criminal Procedure, *are to be applied in each case to each defendant . . . To infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act.*" (*Id.* at 5, 6. Emphasis added.)

In his concurrence, Justice Jackson eloquently summarized his position on individualized bail assessments. He wrote as follows:

> It is complained that the District Court fixed a uniform blanket bail chiefly by consideration of the nature of the accusation, and did not take into account the difference in circumstances between different defendants. If this occurred, it is a clear violation of Rule 46(c). Each defendant stands before the bar of justice as an individual. Even on a conspiracy charge, defendants do not lose their separateness or identity. While it might be possible that these defendants are identical in financial ability, character, and relation to the charge—elements Congress has directed to be regarded in fixing bail—I think it violates the law of probabilities. Each accused is entitled to any benefits due to his good record, and misdeeds or a bad record should prejudice only those who are guilty of them. The question when application for bail is made relates to each one's trustworthiness to appear for trial and what security will supply reasonable assurance of his appearance.

(*Id.* at 9.)

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Since *Stack,* the Supreme Court has recognized an additional legitimate purpose for bail—community safety. (*See* United States v. Salerno, 481 U.S. 739 (1987).) Subsequently, nearly every state has incorporated the two valid purposes for bail—court appearance and community safety—into its laws or rules, along with standards relevant to furthering those purposes. As with Federal Rule 46(c), these standards typically provide for individualized bail determinations, requiring judicial officials to weigh a variety of factors, including, among other things, the nature and circumstances of the offense charged, the weight of the evidence, family ties, employment, financial resources, and character and mental condition of the defendant. (*See, e.g.*, Minn. R. Crim. P. 6.02; N.J. Court Rules, R. 3:26-1; Mont. Code Ann. §46-9-109; W.R.Cr.P. 46.1.) Currently, to avoid setting bail that would be unconstitutionally "excessive," judges must identify the "perceived evil" (i.e., missing court or harming the public) and use the individualized criteria set forth in their jurisdiction's bail laws to evaluate the defendant's likelihood to perpetrate that evil. (*Salerno*, 481 U.S. at 754; s*ee also* United States v. Crowell, 2006 U.S. Dist. LEXIS 88489 (W.D.N.Y. Dec. 7, 2006); United States v. Torres, 566 F. Supp. 2d 591 (W.D. Tex. 2008).)

Despite the clear legal emphasis on the importance of individualized bail determinations, many US jurisdictions have nevertheless adopted a particular device that represents the antithesis of bail fixed according to the personal characteristics and circumstances of each defendant: the bail schedule.

The Purpose and Use of Bail Schedules

Broadly speaking, bail schedules are procedural schemes that provide judges with standardized money bail amounts based upon the offense charged, regardless of the characteristics of an individual defendant. These schedules might formally be promulgated through state law, or informally employed by local officials. They may be mandatory or merely advisory, and may provide minimum sums, maximum sums, or a range of sums to be imposed for each crime. In at least one state, "most, if not all judicial districts have fixed money bail bond schedules that include predetermined amounts of money to be used for determining a bail bond based on the defendant's highest charge." (Michael R. Jones, Claire M. Brooker, Timothy R. Schnacke, *A Proposal to Improve the Administration of Bail and the Pretrial Process in Colorado's First Judicial District*, Jefferson County Criminal Justice Planning Unit (February 19, 2009), at 69.)

Bail schedules are used in a variety of ways, and have been adopted in jurisdictions all over the United States. In a recently conducted poll, nearly 64 percent of respondent counties indicated that their jurisdiction

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uses bail schedules. (*See* The Pretrial Justice Institute, *Pretrial Justice in America: A Survey of County Pretrial Release Policies, Practices and Outcomes* (2009), at 7, *available at* http://www.pretrial.org/Docs/Documents/Pretrial Justice in America.pdf.)

For example, in California, each court is required by law to establish misdemeanor and felony bail schedules for its jurisdiction. (Cal. Pen. Code § 1269b(c) (2010).) These schedules are not only used to provide guidance to judicial officials at bail hearings, they are also used by booking officials to facilitate the release of defendants without judicial review. In Los Angeles County, the court has established a bail schedule for the purpose of "fix[ing] an amount upon which a person who is arrested without a warrant may be released from custody prior to appearance in court." (Los Angeles County 2010 Felony Bail Schedule, *available at* http://www.lasuperiorcourt.org.) That is to say, it sets forth the amount a defendant can pay to obtain automatic release at the jail door. In Los Angeles County, a defendant charged with kidnapping can pay $100,000 (or as little as 10 percent of that amount to a bail bondsman) and secure release without ever seeing a judge. (*Id.* at 4.)

It is sometimes thought that while bail schedules may be inappropriate for serious offenses or repeat offenders, misdemeanor and traffic offense bail schedules are of utility to overburdened courts and jails. These types of schedules are considered useful on the weekends, evenings, or at the jail, purportedly both to give arrestees the opportunity to obtain immediate release and to eliminate unnecessary bail hearings from crowded court dockets. Indeed, courts are hard-pressed to allocate significant time to bail determinations. Between June 2008 and June 2009, local jails admitted nearly 13 million people, and courts had to make pretrial release decisions for each of these defendants. (Bureau of Justice Statistics, U.S. Dep't of Justice, Statistical Tables No. 230122, *Jail Inmates at Mid-Year 2009 - Statistical Tables* 4 (2010).)

Unfortunately, the practical effect of these schedules, however well-intentioned they may be, is to detain large numbers of arrestees on relatively low bonds. Misdemeanor and traffic violation bail schedules impose comparatively low bail, which ostensibly is to afford defendants charged with low-level offenses greater opportunity to obtain release. For example, the State of Utah Uniform Fine/Bail Forfeiture Schedule lists $583 as a standard bail amount for the majority of B-class misdemeanors. (*Available at* http://www.utcourts.gov/resources/rules/ucja/append/c_fineba/.) And yet, a study recently conducted in New York City reveals that in 2008, among defendants arrested on nonfelony charges (misdemeanors and traffic violations) and given bail of $1,000 or less, only 13 percent were able to post bail at arraignment. (Human Rights Watch, The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City 21 (2010) *available at http://www.hrw.org/en/reports/2010/12/02/price-freedom*.) Even more significantly, nearly half of these defendants never made their bail—judges are reluctant to reduce bail unless circumstances have changed significantly—so they were held until the disposition of their cases. (*Id.* at 21.) But even where judges may be willing to reduce bail, public defenders with limited resources and staff typically have to seek such a reduction. (*Id.* at 39.) In the meantime, the arrestees sit in jail because they can't afford their bail.

Bail schedules are so prevelant because courts embrace money as their primary condition of pretrial release.

Finally, where these types of schedules represent a judicial determination that defendants charged with low-risk offenses ought to be released, the appropriate mechanisms are release on recognizance or unsecured appearance bonds. Otherwise, these low bail amounts simply serve as an arrest fine or tax on those defendants who can make bail, while detaining those who can't.

The reality is that even though most jurisdictions can use release on personal recognizance or unsecured bonds to facilitate swift release, bail schedules are so prevalent because most courts have come to embrace money as their primary and singular condition of pretrial release. According to the latest report from the State Court Processing Statistics program, a project that analyzes the processing of felony defendants in the 75 most populous American counties, courts have set money bail for the overwhelming majority of felony defendants since 1998. (Bureau of Justice Statistics, U.S. Dep't of Justice, Bulletin No. 228944, *Felony Defendants in Large Urban Counties, 2006* (2010).) In May 2006, courts set financial conditions of release for 70 percent of felony defendants, and the majority of those defendants who were actually able to obtain release did so through the use of commercial sureties. (*Id.* at 6.) Although the United States is now one of only two countries in the world to permit pretrial release through for-profit third parties, this practice is

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widespread in nearly all of the states. (*See* F.E. Devine, Commercial Bail Bonding: A Comparison of Common Law Alternatives (Praeger 1991).

If asked, courts would undoubtedly argue that bail schedules, both misdemeanor and felony, were adopted with good intentions. These include expediting and streamlining bail determinations, creating consistency among judicial officials in the determination of what a particular crime may be "worth," so to speak, and even permitting defendants to purchase immediate release, thereby reducing unnecessary incarceration and ensuring the right to bail is available as soon as possible. Thus, it is the combination of several factors—(1) the desire to efficiently process numerous defendants, (2) courts' primary use of money-based conditions of release, and (3) the desire to make immediate release possible—that lie at the root of bail schedules. However, despite good intentions, bail schedules have troubling implications for the role of judicial discretion in pretrial release decision making.

Do Bail Schedules Improperly Displace Judicial Discretion?

Judicial discretion is a crucial element of a fair criminal justice system, and individualized bail assessments present early and essential opportunities to exercise it. Appropriately employed, judicial discretion consists of an evaluation of several legal paths in light of all the known circumstances of the particular case at hand, and selection of the most fair and equitable path. The fixing of bail requires judges to weigh the defendant's liberty interest against public safety and court integrity concerns, guided by a variety of often statutorily mandated factors. Because bail decisions restrict a defendant's liberty prior to conviction and must be informed by the attendant presumption of innocence in this stage of the adjudicative process, they cry out for the careful exercise of judicial discretion.

Bail schedules, by contrast, encourage an automated approach to pretrial release decision making by compelling reliance upon a single fixed bail condition—money—found in a predetermined schedule based solely on the defendant's highest charge. As such, they at the very least constitute a troubling delegation of judicial discretion and authority, and at most are illegal and possibly unconstitutional.

At least two state supreme courts have examined the practice of imposing nondiscretionary bail amounts based solely upon the charge and found it deficient. In *Clark v. Hall*, 53 P.3d 416 (2002), the Oklahoma Court of Criminal Appeals (the highest court in Oklahoma on criminal matters) held that a statutory provision mandating a $15,000 bail amount for soliciting a prostitute violated the due process protections of the Oklahoma Constitution. Noting that the obvious intent of the section was pretrial punishment, the court stated: "[The provision] sets bail at a predetermined, nondiscretionary amount and disallows oral recognizance bonds under any circumstances. We find the statute is unconstitutional because it violates the due process rights of citizens of this State to an individualized determination to bail." (*Id.* at 4.) In remanding the case for a proper bail determination, the court specifically referenced prior cases that articulated the guidelines the judges should rely upon in making their individualized assessment.

In *Pelekai v. White*, 861 P.2d 1205 (1993), the Supreme Court of Hawaii held that a trial judge abused her discretion when she rigidly followed a bail schedule without also considering the statutorily mandated relevant personal characteristics of the defendant. In that case, the defendant was detained pursuant to a bail schedule promulgated by the senior judge. He was unable to meet his bail, and at a subsequent hearing, moved to have that bail reduced. There, he presented a number of factors illustrating his low-risk status, but the trial judge denied his request because, according to her understanding, his bail was "the regular bail," that is, the standard amount provided by the bail schedule. Indeed, the judge stated that she had no need to make a finding of the defendant's risk factors unless she intended to deviate from that bail schedule.

The Hawaii Supreme Court held that because the Hawaii legislature granted wide discretion to judges in the setting of bail, it was "an abuse of discretion for the trial court to utilize the [b]ail [s]chedule as the *standard* by which to determine whether to grant [the defendant's] request for reduction of bail." (*Id.* at 1211, emphasis added.)

Notably, the *Pelekai* court likened judicial discretion required by the Hawaiian legislature in bail determinations to judicial discretion required by the Hawaiian legislature in sentencing decisions. (*Id.*) And while there are significant differences between sentencing procedures and bail hearings, the nature and importance of the judicial discretion exercised in both is similar. In both types of hearings judicial decision making should involve consideration of the personal circumstances and characteristics of the defendant. Likewise, in both types of hearings judicial decision making can result in significant restrictions of liberty.

Sentencing hearings are typically deliberate and somber events, with judges often taking significant amounts of time to hear virtually every bit of relevant information. Bail hearings are another matter altogether. As the American Bar Association has noted in its familiar Standards for Criminal Justice:

> [P]roceedings to determine pretrial release often are conducted under circumstances that would not

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> be tolerated at trial. Courtrooms may be noisy and overcrowded, and cases may be treated hurriedly in order to dispose of a large volume of cases in a short period of time . . . [F]irst appearances should not be conducted in a perfunctory manner. Rather, reflecting the importance of the decisions made at this stage, the proceedings should be held in physical facilities that are appropriate for the administration of justice and conducted with the dignity and decorum to be expected of a court proceeding. Each case should be treated individually, with attention to the information about the case that has been developed by the prosecutor, defense counsel, and pretrial services.

(American Bar Association Standards for Criminal Justice (3rd ed.) *Pretrial Release* (2007), Std. 10-4.3 (a) (commentary), at 94-95 (footnote omitted).)

And while judges typically bristle at relinquishing their discretion at sentencing, the use of bail schedules represents a willing surrender of such discretion. Again, the presumption of innocence demands a bail hearing with at least the same kind of discretionary deliberation as is exercised at sentencing. And although bail schedules may be informal or only meant to provide presumptive sums, in practice because judges need to move fairly quickly through bail hearings, the amount in the bail schedule typically becomes the automatic sum. For example, in New York city, judges "set bail in amounts that are familiar and entrenched, and not closely tailored to the individual's resources. Bail amounts tend to fall into categories, e.g., $500, $1,000, or $1,500." (Human Rights Watch at 36.) In short, bail schedules do not merely diminish or impede judicial discretion—they most often simply displace it altogether.

The Impact of Displacing Discretion

When bail schedules are used as an alternative to an individualized hearing before a judge, other disconcerting issues arise. In jurisdictions employing this practice, defendants typically are arrested and brought to a booking officer who sets bail according to the highest crime charged pursuant to the schedule. At this point, the charges have not been reviewed by the prosecutor, and may be more serious than the charges that may ultimately be brought. Unfortunately, this also means that the automatically imposed bond is going to be more costly. The defendant then has the opportunity to post bond immediately, through cash deposit or commercial surety, or wait for a bail hearing before a judge. Obviously, those defendants who can afford the predetermined bail sum are released without judicial examination, while those who cannot are detained. The dispositive difference between these particular populations is their access to money, not the risks they pose. Hinging pretrial liberty upon such a distinction raises issues of public safety as well as questions about the fundamental fairness of a pretrial release system based upon money.

Colorado, while not necessarily unique, is one state where many judicial districts employ bail schedules that allow defendants to avoid a judicial hearing by paying a sum of money at the jail door. (*See* Jones, et al.) A 2006 study conducted in Jefferson County, Colorado, found the following:

> In 2006, approximately 1,950 (8%) of the 23,789 inmates released from the Jefferson County Detention Facility left the jail without a judicial officer setting an individualized bail bond. Thirty-six percent of these defendants were charged with a felony offense (i.e., person, property, weapons, or drug), and 43% of the defendants were charged with a misdemeanor offense (i.e., person, property, driving, or drug). The remainder was charged with traffic (16%), petty (2%), civil (1%) or unknown classification (1%) offenses. Jefferson County Pretrial Services reports instances in which they complete individualized pretrial risk assessments and make recommendations for bond conditions that would likely lessen that risk. However, because these defendants posted the scheduled money bond amount, a judicial officer did not have the opportunity to include any of the recommendations as conditions of bond prior to the defendants' release.

(*Id.* at 74.)

Judicial discretion at bail serves not only to curtail unnecessary restrictions of personal liberty, but also to provide for community safety. In the cases cited above, potentially riskier (but wealthier) defendants are allowed literally to purchase their freedom without seeing a judge, who, if given information about that risk, might impose any number of release conditions designed to further public safety. To the extent that bail schedules encourage judges to surrender their ability to impose such discretionary conditions, they run completely contrary to public safety interests.

The practice reported in Colorado is not uncommon nationally, and thus the use of bail schedules has been addressed specifically by the American Bar Association in its Standards. Specifically, the ABA recommends that "[f]inancial conditions should be the result of an individualized decision taking into account the special circumstances of each defendant, the defendant's ability to

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meet the financial conditions and the defendant's flight risk, and should never be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge." (ABA Standard 10-5.3 (e) at 110.) In explaining this position, the ABA states:

> This Standard flatly rejects the practice of setting bail amounts according to a fixed schedule based on charge. Bail schedules are arbitrary and inflexible: they exclude consideration of factors other than the charge that may be far more relevant to the likelihood that the defendant will appear for court dates. The practice of using bail schedules leads inevitably to the detention of some persons who would be good risks but are simply too poor to post the amount of bail required by the bail schedule. They also enable the unsupervised release of more affluent defendants who may present real risks of flight or dangerousness, who may be able to post the required amount easily and for whom the posting of bail may be simply a cost of doing 'business as usual.'

(ABA Standard 10-5.3 (e) (commentary) at 113.)

Conclusion

Regular use of bail schedules often unintentionally fosters the unnecessary detention of misdemeanants, indigents, and nondangerous defendants because they are unable to afford the sum mandated by the schedule. Such detentions are costly and inefficient, and subject defendants to a congeries of often devastating and avoidable consequences, including the loss of employment, residence, and community ties. On the other hand, bail schedules permit dangerous or risky defendants to purchase release without judicial review or other conditions tailored to prevent danger or flight. Frequently, such defendants are career criminals who possess the funds necessary for bail and expect to have to post bail as a part of their "business," such as in the case of John "Junior" Gotti, who posted a $2 million bail in December of 2009, or "legendary mobster" Sonny Franzese, who posted a $1 million bail in May of 2010. (Human Rights Watch at 20.)

Instead, criminal justice systems could employ other, less deleterious release mechanisms that simultaneously address the concerns of bail while facilitating rapid and fair release. For example, many of the arrests for misdemeanor and traffic offenses are unnecessary. Some jurisdictions have adopted cite and release programs in which police officers issue citations for nonviolent, low-risk misdemeanor and traffic offenses, rather than making custodial arrests. (*See, e.g.*, APD News, *APD to launch expanded Cite and Release Program*, Feb. 20, 2009, *available at* http://www.ci.austin.tx.us/police/apd_news.htm.) With the proper information, law enforcement officers can fairly easily identify which arrestees may safely qualify for this type of release. Other jurisdictions, such as Philadelphia, hold first appearance hearings seven days a week, permitting judicial officers to make pretrial release decisions for all custodial arrests. Many court systems have pretrial services programs that interview all arrestees and identify their individual risks, as well as pretrial release conditions designed to alleviate such risks while enabling swift and appropriate release. Ultimately, there are a variety of tools available to jurisdictions that have proven much more effective at fulfilling the purposes of bail while ensuring no one is unnecessarily detained.

While bail schedules may strike some as a useful tool, too often they represent an improper and ill-advised, if not illegal, substitute for judicial discretion at bail. And discretion in bail determinations is required to ensure that the purposes of bail are appropriately, precisely, and fairly effectuated in all cases, for all defendants. It helps ensure both that unnecessary detentions are avoided and that risky defendants are subject to individualized and responsive bail conditions—outcomes that can only be realized through an analysis of the circumstances surrounding each particular defendant.

As Justice Jackson stated in his concurring opinion in *Stack,* "The first fixing of bail, whether by a commissioner . . . or by the court upon arraignment after indictment . . . is a serious exercise of judicial discretion." (*Stack*, 342 U.S. at 11.) This serious exercise cannot and should not be replaced by the pre-established determinations found in bail schedules, implemented primarily to speed the processing of defendants in overburdened court dockets. ■

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