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Remark

FIXING NEW YORK'S BROKEN BAIL SYSTEM¹Justine Olderman^{d1}

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I. The Problem of Bail

New York City jails are currently filled with people who are serving time but haven't been convicted of anything at all. They are there for one reason. They cannot afford the price of their bail. Bail is the single most important decision made in a criminal case. Bail is what determines whether someone will plead guilty or fight a case and whether he or she will receive a jail sentence or be given an alternative to incarceration. Spend a week or two representing people who are held "in"² on bail and it will be obvious that the effect of bail on the outcome of a person's case is only part of the problem. People sit in jail for days, weeks, months, and sometimes years waiting for their trial date.³ The effect on their lives and the lives of their families is nothing short of devastating.

***10** For too long, the problem of bail has gone ignored--not just by people working outside of the criminal justice system, but also by those of us who work within it. Judges, prosecutors, and even defense attorneys have been complacent about the routine incarceration of people too poor to post bail. But thanks to the Human Rights Watch report on bail and panels like this, all that is changing.⁴

The vast majority of the people coming through New York City's criminal justice system are poor people of color from marginalized and under-resourced communities.⁵ And the vast majority of them cannot afford the price of their bail even when the bail may seem relatively low. For example, according to one study, 88.7% of people who had bail set at \$1,000 could not raise the money to pay that bail at their first court appearance and so, instead of being released, were sent to Riker's Island.⁶ In 2009, at least half of the people sitting in New York City jails were there simply because they could not afford the price of their freedom.⁷

People who cannot afford to post bail will remain in jail until they plead guilty, the case goes to trial, or the case is dismissed. I had a client a few years ago who was charged with attempted murder. He was held in on bail that was too high for him to post. It took two-and-a-half years for his case to go to trial and it took the jury twenty-eight minutes to acquit him. In the end, he served two-and-a-half years for nothing. Unfortunately, his story is all too common. In the Bronx, it takes up to two years for a felony to go to trial--and if you're charged with murder it can be three years or more.

Misdemeanor cases go to trial faster than felonies, anywhere from three to nine months. But even that length of time is unacceptable, especially given studies that show that in almost 25% of ***11** non-felony cases where the accused is held in on bail, the charges are ultimately dismissed.⁸ In another 25% of the same type of cases, even when the person is convicted, he or she receives a non-incarceratory sentence.⁹ In the end, half of all non-felony clients are incarcerated not because they have been convicted of a crime and sentenced to jail but because they are poor.

Lucy G.¹⁰ is one of those people. She has been held in jail for seven months on \$500 bail with no trial in sight. She was stopped on the street for being a “known drug user.” The police claim they saw her drop a crack pipe with cocaine residue. Lucy was arrested and charged with misdemeanor possession of a controlled substance. The prosecution has offered Lucy a conditional discharge if she pleads guilty. A conditional discharge is a non-incarceratory sentence that simply requires that the person commit no new crimes for a period of one year. But pleading guilty to the charge will make Lucy, who is a legal permanent resident, deportable. And so, she sits in jail and she waits. Her next court date is still two months away.

Given how long it takes to have a judge or jury hear a criminal case, it is not hard to imagine what effect a robust plea bargaining system, like the one in Bronx County, has on the right to trial. If someone is offered a plea to less time than he or she will serve waiting for trial, that person will never see the inside of a trial courtroom. In fact, in my twelve years as a criminal defense lawyer, I can count on one hand the number of clients who exercised their right to trial when doing so meant that they would stay in jail longer than if they accepted a plea bargain. People will accept almost any plea to get out of jail, to be with their loved ones, and to move on with their lives. People like Howard A.

Howard A. had been divorced for a number of years when he met a young woman who lived in his building. She was outgoing and vibrant, interesting and attractive. It didn't take long before the two started dating. But soon afterwards, he got a knock on his door from the young woman's father. It turns out that she had lied about her age and was just seventeen. Although she was legally an adult, Howard told her that he could not be with her anymore. She begged and pleaded with him and eventually became hysterical and angry. Two days later, after Howard ignored her calls and *12 knocks at the door, she went to the police and accused him of assault. There were no injuries or medical records to support her allegations. There were no witnesses who would back up what she said. There was no evidence except her word. But in our criminal justice system, the word of one person is enough. And so, Howard A. was arrested, taken to Central Booking, and charged.

Before I met him, Howard A.'s only contact with the criminal justice system had been an arrest for driving with a suspended license. Nevertheless, the judge at his arraignment set bail in the amount of \$2,500 cash or insurance company bond. Howard was self-employed and work had been slow recently. He was barely getting by and could not afford the price of his bail. Like so many others, Howard was sent to Riker's Island where he sat for six days until his next court date. In that time, he missed out on several jobs, a rent and child support payment, and a visit with his four year-old daughter. On his next court date, the prosecution made Howard an offer. If he pleaded guilty, he could receive a sentence of time served which would mean that he could go home that very day. If he didn't, he would have to wait months on Riker's Island for a trial date. He accepted the plea, but Howard A., a forty-two year-old man, wept openly as he did.

The decision to release someone on his or her own recognizance or to set bail gets made at the very beginning of a criminal case but that decision alone can, and often does, wipe out the most sacred bedrock of our criminal justice system--the right to trial.¹¹ Indeed, because so many people who are held in on bail feel forced to plead guilty, people are almost twice as likely to end up with a conviction if they are held in on bail than if they are out.¹² While statistically hard to quantify, being held in on bail may also increase the chance that a person will be convicted at trial.¹³ If the accused is locked up, that person can't track down witnesses, look for other evidence, or prepare for trial with his or her lawyer as easily as someone who is at liberty. On the most basic level, the bail decision significantly limits a person's ability to assist in his or her own defense.

Not only does the bail decision have an impact on the likelihood of conviction, but it also affects sentencing. There is a saying among criminal defense attorneys: “Once you are out, you stay *13 out.” Every defense attorney knows that if someone is out, that person is likely to receive a non-incarceratory sentence even if he or she is convicted of a crime. However, if the same person is in on bail when convicted, he or she is likely to receive a jail or prison sentence.

The differences in sentences for those who are in and those who are out are stark. If someone is in because she can't afford the bail, that person is almost three times more likely to receive a jail sentence if convicted than if she is out on bail.¹⁴ Even

when people who are out receive jail sentences, their sentences will invariably be shorter than their counterparts who are held in on bail.¹⁵

These statistics are supported by a report issued by The Bronx Freedom Fund, a bail fund that was created by The Bronx Defenders.¹⁶ For over two years, the Fund posted bail for 186 people who did not have the financial resources to secure their own freedom. Fifty percent of those cases were dismissed on motion of the prosecution; in cases where there was a conviction, the prosecution did not seek a jail sentence in a single case.¹⁷

The effect of bail on case outcomes is unconscionable and a perversion of everything the criminal justice system is supposed to stand for. But the impact that it has on people's lives is nothing short of devastating.

II. Enmeshed Penalties of Incarceration

One of the most devastating consequences of being held in on bail is that hard working people lose their jobs. For most people, missing one, two, five, ten days of work while they are locked up trying to get bail money together--or trying to work out a plea to something they didn't do so they can get out of jail--is not an option. I can't tell you how many clients I have represented who have been fired from their jobs--not because they were convicted of a crime but because they were accused of one, had bail set, and *14 missed work as a result. Many clients who are released after an arrest similarly lose their jobs. However, if a person who is out loses his or her job because of an arrest and the case is ultimately dismissed, that person can receive back pay for the entire period he or she was out of work.¹⁸ In contrast, a person held in on bail is ineligible for back pay even if the case is dismissed.¹⁹

Eviction is another common consequence of a judge's decision to set bail. Being held in jail for even a short period of time can result in the loss of a Section 8 apartment, a bed at a shelter, as well as supportive AIDS/HIV housing.²⁰ Having bail set can cause people to miss making rent payments and housing appointments. That single decision can result in homelessness not just for the person arrested and held in on bail, but also for his or her entire family.

Jose F. lived in public housing but was looking to move into a building with social support services on-site to help him with his mental illness. While he was looking, he was accused of violating a Family Court order of protection, arrested, and held in jail on \$5,000 bail. Because he was incarcerated, Jose's Social Security benefits were suspended, the treatment providers who were helping him move closed his case and he was ultimately evicted from public housing. When his family was finally able to scrape up enough money to hire a bondsman to bail him out, he had no place to go. To this day, Jose continues to be homeless without the supportive mental health housing he so desperately needs.

Nowhere is the distressing effect of bail more obvious than with our undocumented clients. Even twelve hours at one of the city jails is sufficient for Immigration and Customs Enforcement officers to find people held in on bail, determine that they are deportable, and place a hold on them so that they cannot be released even if they prevail in their criminal case. People who are arrested and held in on bail are routinely rounded up because of minor misdemeanor convictions and deported to countries that many of them have not seen since they were children.

Unemployment, homelessness, and deportation are not the only consequences of a judge's decision to set bail. There are many more. Being held in on bail can cause people to lose their benefits, which can take months to get back even after they are released *15 from jail. It can cause the Administration for Children's Services to start a neglect proceeding against a parent who has nobody to look after his or her child while in on bail. And on the most basic level, being held in on bail destabilizes families, separating parents from children--and husbands from wives--for days, weeks, months, even years waiting for a resolution to their case.

III. The Way It Is Meant to Be

It doesn't have to be this way. This is one of those rare instances when the legislature is actually on our side. Or at least it was back in 1970. In 1970, long before anyone was thinking about collateral consequences of incarceration, the legislature was troubled by the notion that setting bail in amounts that people could not make was causing them to serve time, even though presumed innocent.²¹ And so, the legislature created a new bail statute with five provisions that were drafted to make sure that exactly what is happening today didn't happen. That statute is still in place. It is still the law. The problem is that nobody follows it.

The first provision is the clear statement in New York's bail statute that the "only purpose of bail is to ensure someone's return to court."²² In New York, a judge cannot set bail because he or she is worried that the accused is going to go out and commit another crime or because the judge thinks the person is a danger to the community. The decision to limit the purpose of bail to ensuring someone's return to court was not accidental. Many people who were involved in drafting the 1970 bail statute wanted judges to have the power to set bail based on the likelihood that the accused would reoffend or the belief that the person charged was a danger to the community.²³ And in fact, many states²⁴ as well as the federal government²⁵ allow judges to set bail based on those considerations. But New York explicitly rejected those approaches.²⁶ The decision *16 to reject risk of reoffending and danger to the community as bases for bail was a monumental one not only because it departed from the mainstream approach but also because setting bail to ensure someone's return to court, at least objectively, is not loaded with the same historical race and class biases as dangerousness.²⁷

The second important aspect of New York's bail statute is the provision creating nine forms of bail.²⁸ Prior to the enactment of the 1970 statute, there were limited forms of bail that a judge could set and all of them were difficult for poor people to make. As part of the new bail statute, the legislature included bail bonds that allowed someone to put down just 10% of the bail with a simple promise to pay the remainder if the accused did not return to court.²⁹ The law also provided for bail bonds that do not require any money to be put down at all.³⁰ Instead, the accused, his family, or friends could simply sign a bond and an affidavit promising to pay the full amount in the event the accused failed to return.

Third, the statute requires a bail-setting court to select not one, but two forms of bail from the list of nine to make it easier for a person accused to be released on bail,³¹ and allows the court to set bail in any amount it chooses so that judges can tailor the price of bail to what the accused can afford.³²

Fourth, the statute lists eight factors for the court to consider when deciding whether to set bail, what forms to set, and what the amount should be. Most importantly, the statute requires judges to *17 consider the accused's financial resources,³³ to prevent judges from making generic decisions based solely on the type of case or someone's criminal history.

Finally, the legislature created different ways of challenging a judge's bail determination or for making renewed bail applications. For example, when bail is set by a lower Criminal Court judge, the lawyer can make a de novo, or new, bail application before a higher court.³⁴ Even when the bail is set by a Supreme Court judge, a lawyer can file a bail writ and argue that the bail was excessive or otherwise violates the bail statute.³⁵ A lawyer may also make renewed bail applications as the lawyer learns new information that bears on the statutory bail factors.³⁶

The legislative intent is there. The law is there. And yet, here we are. Our jails are filled with people who haven't been found guilty of anything and yet are locked up simply because they cannot afford the price of their freedom. Something isn't working.

For those of us who work in the criminal justice system, the reasons are clear.

IV. The Bail Disconnect

First, the bail statute isn't working the way it was intended because, despite the statutory purpose of bail, judges are not setting bail based solely on what is necessary to secure someone's return to court. Instead, they routinely set bail based on the two factors that New York explicitly rejected when it passed the bail statute--risk of re-offending and danger to the community.³⁷ Judges are on the front lines, making difficult decisions based on little information in a short period of time, and they are human. No judge wants his or her name to be on the front page of the New York Post or Daily News because he or she released someone who went out to commit a headline-grabbing crime. And so judges err on the side of caution, setting higher bail in more cases not because high bail is what is necessary to ensure the person's return to court, but rather because if this person goes out and kills his romantic partner or *18 drives drunk and hits someone, it will appear that the judge did his or her part to protect society.

Second, judges are not making individualized bail decisions. It is impossible to figure out how much bail is enough to bring someone back to court but not too much to keep the person in jail without looking at the accused as an individual. Also, it is hard to figure out what is necessary to secure someone's return to court without asking about the person's financial resources. But only a handful of times has a judge asked me anything about a client's finances before setting bail. Instead, bail is set in exactly the way that the legislature feared. It is set based on someone's criminal record, his or her history of not coming back to court, and the nature of the charges. For example, if the case alleges a sexual assault, chances are that bail is getting set regardless of the statutory factors and it is going to be high--in the low thousands if you are lucky and as much as in the hundreds of thousands if you are not.

Third, judges are also setting bail in generic amounts. If you sat in arraignments and listened to bail being set you would think that the law required judges to set bail in increments of \$250 when setting bail under \$1,000 and in \$500 increments for anything over \$1,000. You will hear over and over again, "\$1,000 bail." "\$1,500." "\$2,000." You will never hear a judge set bail in the amount of \$674, even though that amount for a particular person may strike the perfect balance of what will enable someone to be released and yet ensure that they will return to court.

Finally, judges are not using the nine different forms of bail created by the legislature.³⁸ Those bonds that require a small amount of cash down or require nothing but a promise to pay the full amount if the person doesn't return to court are rarely, if ever, used. Instead, judges set bail in only two of the nine forms: cash and insurance company bail bond. These are the two forms of bail that existed before the 1970 bail statute. Forty years later, nothing has changed. Judges are still using the two forms of bail that are the hardest for poor people to make. Cash requires that you pay the full amount of bond upfront. Most of the people caught up in the criminal justice system do not have a lot of money just sitting in a bank account waiting to be taken out. And insurance company bondsmen will not even sign a bond for low amounts of bail.³⁹ *19 When they do agree to sign a bond, they often require as much as 30% down and take up to an 8% fee for their business.⁴⁰

V. An End to Complacency

So the natural question is, "What can we do about it?" While there is much that judges and prosecutors can and should do about the problem of bail in New York, what I can speak to best is what we, as defense attorneys, can and need to do ourselves. The answer is more. A lot more. The truth is that we have become complacent about bail. We work day in and day out in a system that is so filled with injustices that sometimes it is hard to know where to look, what to focus on, or how to bring about change. And, unfortunately, over time we simply stop seeing the injustices that are right in front of us. I am the first to admit that until a few years ago, I had never really looked at the bail statute. I certainly never asked a judge to set a form of bail other than cash or insurance company bond. I knew there were other options but, honestly, I didn't understand them. The other forms of bail have names like "partially secured surety bond." I didn't know what any of those words meant let alone how to advocate for them. But I've now been working on this issue with other people from my office and with public defenders around the city and I have found that something really amazing is happening. We are slowly, very slowly, changing the practice. We have created

comprehensive teaching materials, conducted trainings for lawyers across the city as well as upstate, and have even instructed judges at the Judicial Institute on the intent of the legislature, key statutory provisions, and alternative forms of bail. We have started to put all that we have learned into practice. Over the last few months, we have been pushing the issue by asking judges for some of these other forms of bail, and guess what? Judges are doing it. Not all of them. Not in every case. But they are doing it. And over the last few months we have been challenging judges when they set bail in violation of the statute by taking appeals and filing writs of habeas corpus, and guess what? We are winning. Not all of the time. Not in every case. But we are winning. As defense attorneys we have already come a long way, but we have a much longer way to go. We cannot allow ourselves to become complacent again. The injustice brought about by bail is too big to ignore. We have to fight and keep fighting.

***20** As defense attorneys, we need to demand that what is on the books is followed by judges. We need to demand adherence to the letter of the law, because what is going on with bail right now is lawless and results in sheer devastation to individuals, families, and communities. A person's freedom should never be decided based on the size of his or her wallet. It shouldn't be and it doesn't have to be. We have the tools right here in the law to make bail individualized, reasonable and even, I dare say, just.

Footnotes

- 1 The following remarks were prepared in conjunction with a panel discussion hosted by the City University of New York Law Review on February 23, 2012 titled "Bail: Incarcerated Until Proven Guilty."
- d1 Justine Olderman graduated magna cum laude and Order of the Coif from New York University School of Law. While at NYU, Justine was the Managing Editor of the Review of Law and Social Change and was awarded the George P. Faulk Memorial Award for Distinguished Scholarship; Justine spent two years clerking for Judge Robert J. Ward in the Southern District of New York before joining The Bronx Defenders in 2000. After working for a number of years as a staff attorney, Justine became a training team supervisor for new lawyers, then a team leader for experienced practitioners, and is currently the Managing Attorney of the entire Criminal Defense Practice. As Managing Attorney, Justine helped lead a city-wide bail initiative bringing together public defenders across the city to address the problem of bail in New York. In addition to participating as a panelist at CUNY School of Law's forum on bail, "Bail: Incarcerated Until Proven Guilty," she also spoke at John Jay's Guggenheim Symposium panel "Jailed Without Conviction: Rethinking Pretrial Detention During the 50th Anniversary of Gideon v. Wainwright." She has taught Bail Advocacy at the Judicial Institute, the New York State Defender's Association's annual conference, and public defender offices around the city. In addition to her work at The Bronx Defenders, Justine was an adjunct professor of Legal Writing at Fordham Law School and of Persuasion and Advocacy at Seton Hall Law School. She has also taught CLE courses on Persuading through Storytelling.
- 2 People held "in" on bail are detained in jail as a result of not paying the amount of bail set for them by a judge. Those who are "out" have either posted bail, or have been released on their own recognizance.
- 3 See William Glaberson, Justice Denied: Inside the Bronx's Dysfunctional Court System: Faltering Courts, Mired in Delays, N.Y. Times, Apr. 13, 2013, <http://www.nytimes.com/2013/04/14/nyregion/justice-denied-bronx-court-system-mired-in-delays.html> (reporting that the Bronx "was responsible for more than half of the cases in New York City's criminal courts that were over two years old, and for two-thirds of the defendants waiting for their trials in jail for more than five years").
- 4 See Human Rights Watch, The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City (2010), available at <http://www.hrw.org/node/94581>. Since these remarks were delivered, the call to fix New York's broken bail system has been taken up by others, including Chief Judge Jonathan Lippman, who, in his State of the Judiciary address, made bail reform a top priority for 2013. Chief Judge Jonathan Lippman, N.Y. State Unified Court Sys., The State of the Judiciary 2013: "Let Justice be Done, Though the Heavens Fall" 3-6 (2013) [hereinafter The State of the Judiciary 2013]. For an analysis of the State of the Judiciary, see Joel Stashenko, Lippman Proposes Bail System Fix, Expansion of Supervised Release, N.Y.L.J., Feb. 6, 2013, http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202587085501&Lippman_Proposes_Bail_System_Fix_Expansion_of_Supervised_Release&slreturn=20130312124546.
- 5 See Human Rights Watch, *supra* note 4, at 1, 48, 61, 68.
- 6 *Id.* at 21.

- 7 Id.
- 8 Id. at 29.
- 9 Id.
- 10 All names used in this piece have been changed to protect the anonymity of the subjects.
- 11 U.S. Const. amend. VI; N.Y. Const. art 1, § 2.
- 12 Human Rights Watch, *supra* note 4, at 33.
- 13 Mary T. Phillips, *Bail Detention & Felony Case Outcomes*, N.Y.C. Crim. Justice Agency Res. Brief, Sept. 2008, at 5.
- 14 Id.
- 15 Id. at 6.
- 16 The Bronx Freedom Fund closed temporarily when questions arose over whether the Fund had to be regulated, by the New York State Department of Financial Services, just as commercial bondmen do. As a result of the Fund's closing, The Bronx Defenders pushed to have a bill passed that would allow charities to post bail up to \$2,000 for people charged with misdemeanors without being subject to the same oversight as for-profit companies. In July 2012, Governor Andrew M. Cuomo signed the Charitable Bail Bill, A. 10640-B, 235th Sess. (N.Y. 2012), into law allowing the Fund to re-open. See N.Y. Ins. Law § 6805 (Westlaw, West 2012).
- 17 The Bail Fund, The Bronx Freedom Fund, [http:// www.thebronxfreedomfund.org/our-model.html](http://www.thebronxfreedomfund.org/our-model.html) (last visited Mar. 1, 2013).
- 18 See N.Y. Exec Law § 296(15) (McKinney 2012); N.Y. Correct. Law § 752 (McKinney 2012).
- 19 See statutes cited *supra* note 18.
- 20 See, e.g., 42 U.S.C. § 13661(c) (2006).
- 21 N.Y. Crim. Proc. Law § 510.30 cmt. (McKinney 2012) (Preiser Practice Commentary).
- 22 N.Y. Crim. Proc. Law § 510.30(2)(a) (McKinney 2012).
- 23 N.Y. Crim. Proc. Law § 510.30 cmt. (McKinney 2012) (Preiser Practice Commentary).
- 24 See generally 8A Am. Jur. 2d *Bail and Recognizance* § 28 (2013) (providing overview of approaches to bail across states).
- 25 See 18 U.S.C. § 3142 (2006).
- 26 Since these remarks were delivered, Chief Judge Jonathan Lippman has reignited the debate over the purpose of bail by calling for changes in the bail statute that would allow judges to consider public safety when setting bail. The State of the Judiciary 2013, *supra* note 4, at 3-4. In response to that call, a bill has been introduced in the State Senate seeking to amend the Criminal Procedure Law to allow judges to consider both what is necessary to secure someone's appearance in court as well as safety to the community. An Act to Amend the Criminal Procedure Law, in Relation to the Issuance of Securing Orders, S. ___/ A. ___ (Feb. 14, 2013).
- 27 While “dangerousness” and “risk of re-offending” are objective on their face, these criteria may still lead to discrimination in bail setting practices. If judges stereotype people of color as more prone to criminal behavior, as they historically have, then they will be more inclined to use “dangerousness” and “risk of re-offending” as a proxy for race-based decision-making.
- 28 N.Y. Crim Proc. Law § 520.10(1) (McKinney 2012).
- 29 See *id.* § 520.10.
- 30 Id.
- 31 Id. § 520.10(2)(b).

- 32 See generally *People ex rel. McManus v. Horn*, 18 N.Y.3d 660, 665 (2012). While the plain language of the statute requires judges to set two forms of bail, some judges have read the statute as simply giving them the option of setting bail in more than a single form. In 2010, after a judge set cash only bail, The Bronx Defenders filed a writ of habeas corpus challenged the judge's reading of the statute. The writ was denied, as was the appeal to New York's Appellate Division. However, armed with legislative history and buttressed by legislative intent, Marika Meis, the Legal Director of The Bronx Defenders took the case all the way to the Court of Appeals. In reversing the lower courts, the Court of Appeals noted: "[p]roviding flexible bail alternatives to pretrial detainees--who are presumptively innocent until proven guilty beyond a reasonable doubt--is consistent with the underlying purpose of Article 520." *Id.* at 665.
- 33 N.Y. Crim. Proc. Law § 510.30(2)(a) (McKinney 2012).
- 34 See *id.* § 530.30.
- 35 *Id.* § 530.40.
- 36 See *id.* § 510.20 cmt. (Preiser Practice Commentary). A New York State Superior Court may review denial of bail by the Criminal Court if constitutional standards inhibiting excessive bail or arbitrary denial of bail are violated. See, e.g., *People ex rel. Klein v. Krueger*, 25 N.Y.2d 497 (1969).
- 37 See N.Y. Crim. Proc. Law § 510.30(2)(a).
- 38 See *id.* § 520.10.
- 39 Mary T. Phillips, *Making Bail in New York City*, N.Y.C. Crim. Justice Agency Res. Brief, May 2010, at 2 (reporting that commercial bond agents will not sign a bond for \$1000 or less because they will not make enough money on such a relatively low amount).
- 40 *Id.*

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