The View From Inside: The Bail Reform Act of 1984

INTRODUCTION BY BEN SHAW *

Two summers ago, I was fortunate enough to participate in the Street Law Community Clinic of the Georgetown University Law Center, 1 which allowed me to teach a weekly class to inmates at the District of Columbia Jail (“D.C. Jail”). Together, the students and I explored the origins and practical effects of constitutional and criminal law, particularly as they are experienced by marginalized communities.

For the men that I was working with, this was not a theoretical exercise. All of them were pretrial detainees, a term that can be a bit misleading, as it conjures up the image of someone waiting a few days or weeks for, well, a trial. The majority of the class, though, was among the ninety-seven percent 2 of criminal defendants who end up taking a plea bargain. One might think that this is a quick process, and sometimes it can be. Frequently, however, it is not. Continuances, heavy caseloads, and other circumstances can result in defendants, including those who are awaiting trial, languishing in jail for unacceptably long periods of time. 3 Some of the students had been pretrial detainees for over two years.

Their extended time in confinement, however, had not made them any less eager to learn. At the end of the three-month course, one of the men in the class, Andre Lyons, asked me if I would be willing to keep teaching each week. We’ve been at it ever since.

Every few months, the class collectively proposes topics that they would like to cover—how a jury is selected, what a criminal defendant can rightly expect from a lawyer, the makeup and polices of the United States Sentencing Commission, and the mechanics of civil asset forfeiture, among others. This becomes our syllabus. After covering the proposed issues, the men vote on a topic that they would like to study at length.

This past summer, the class was interested in learning more about pretrial detention, and the justification for holding someone who has not been convicted of a crime. As a result, we read relevant portions of the Bail Reform Act of 1984, 4 legislation allowing the detention of criminal suspects that, after an adversarial hearing, are determined to be a “danger to the community,” even if that determination is based on crimes that the judge believes the suspect might commit in the future. We also read the entirety of United States v. Salerno, 5 the Supreme Court decision that upheld the Bail Reform Act. In

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* Georgetown University Law Center, J.D. expected 2017.
5 481 U.S. 739, 747 (1987) (holding that pre-trial detention is a “potential solution to a pressing societal problem” because the government’s interest in protecting the community outweighs individuals’ liberty).
studying the opinion line by line, we explored not only the legal concepts surrounding pretrial detention, but also how it came about, what other sorts of approaches might be more just, and how members of the community—including people who are incarcerated—can advocate for change.

The three essays that follow—including one by Mr. Lyons, who for the past year and a half has had both a perfect class attendance record and a still un-finalized plea—are a part of that advocacy. The entire class, including the students who elected not to write, is very grateful to the American Criminal Law Review for providing an opportunity to share their thoughts on an issue that is especially important to them and their families. There are valid, differing viewpoints on the advisability of pretrial detention, but these blog posts (which have not been edited) are a worthwhile reminder of the human cost that it imposes.

**ANDRE LYONS**

Things have changed since *Salerno* was decided in 1987. The Bail Reform Act of 1984 is outdated—technology has evolved in the last thirty-one years, and courts have many more options to consider, including GPS monitoring (known in jail as “the box”), or home confinement. The system was never designed to pass pre-judgment, or in other words, to make the defendant prove his innocence. But in the court’s eyes we are guilty. The law, though, states that we are innocent until proven guilty, so if that’s the case, we should have the chance to have some form of bail, whether it be GPS, personal recognizance, or cash bond.

The Bail Reform Act that so badly needs to be done away with has affected me in many different ways. It has:

1) Taken me away from my family and children that have depended on me their entire lives. I’ve always paid their bills, supporting a household of six children, and three grandchildren, as well as my parents.
2) Prevented me from having the chance to seek my own counsel and pick one that can best represent me. The system takes this constitutional right from us, sticking us with lawyers that make us feel like things are a set-up from the start.
3) Limited my ability to research case law, because the limits of the library mean that we don’t have good access to books or computers.
4) Dragged my court date out for years, forcing those who are not driven by willpower to give in to the threats from the DA about the different enhancements that they will enforce on us, making those individuals take a plea when the DA doesn’t even have a strong case on them.

In closing, I believe that with the technology that we have in place today, it will lessen the risk of a defendant being a “flight risk” and let us exercise our constitutional rights to be treated like we are innocent until proven guilty. I feel if I could have gotten this

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6 *Id.*
7 §§ 3141-3156 (Westlaw).
opportunity and be granted home monitoring, I would not have to be writing this letter to begin with.

ANONYMOUS

There are a number of reasons why the current statute regarding pre-trial detention should be re-written or, better yet, repealed. The two main rationales that are explicitly stated in the Act permit pretrial detention on the grounds of future dangerousness and risk of flight, the latter more compelling than the former.

The Bail Reform Act of 1984\(^8\) requires courts to detain individuals prior to trial when they are charged with certain serious felonies if the government demonstrates, by clear and convincing evidence after an adversary hearing, that no release conditions will reasonably assure the safety of any other person in the community. Although there are a number of procedural safeguards created to protect the integrity of the process and defendant, they quite frankly have always been manipulated and taken advantage of by the government and have remnants of Congress and the Supreme Court’s conservative roots.

Time and time again, I have seen the procedural safeguards violated by the government as it seeks to get a detention order (mostly based on “future dangerousness”). For example, I have seen the government bring forth charges that are unrelated in order to take advantage of “presumed dangerousness.” The Supreme Court has ruled that the government’s compelling interest in regards to the safety of the community outweighs any defendant’s right to liberty. It has also ruled that detention on the assumption of future crimes committed by the defendant is legal (although this is not Minority Report\(^9\)).

The portion of the majority opinion in Salerno interpreting the Eighth Amendment ruled that the Amendment says nothing about bail being available at all. Common sense would say the writers of the constitution intended that bail should not be set at an infinite amount, and this is even more evident when you compare our judicial system in its entirety, especially bail, to that of our European counterparts, and when you realize that our constitution was derived from the Magna Carta, then it is very hard to justify the amount of people who are held in America on the basis of pre-trail detention, and who are incarcerated as a whole.

Finally, I believe that this Act by Congress desperately needs updated text to suggest the advancement in technology in terms of ways to curb risk of flight and ensure a defendant’s presence in court.

In my case, although I wanted to go home, I believe that the judicial officer was following the laws written by Congress, and the government was following procedures

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\(8\) Id.

\(9\) MINORITY REPORT (Twentieth Century Fox 2001). Minority Report is a film in which citizens are arrested for future crimes which they have not yet committed.
that in essence always obliterates a defendant’s chance of getting released pending trial (or in ninety-seven percent of cases, a plea).

**Jermaine McGregor**

Over time, the concepts of freedom and democracy have grown within me. My ideas started before I was incarcerated. I wanted to find a better way of life for the people of my school and village in Jamaica. Therefore, I started a non-profit to inspire and help those in poverty. My primary concern was for the poor, who were wrongfully accused. I wanted to give them hope and help them attain peace.

How do people live in a democracy? They vote for their leaders, and the leaders make laws. People want laws that are fair to everyone. This, however, is not the reality. Many incarcerated people do not receive fair treatment under current laws. Many people detained by federal officials are held in facilities run by private prison companies. The average cost of this incarceration is more expensive than public facilities. Seeking to increase industry profits, jails and prisons argue to incarcerate more people than necessary, and extend sentences beyond that which is appropriate.

Private correctional institutions have been found guilty of abuses ranging from understaffing their facilities to bribing judges to sentence juveniles unfairly. Also, some inmates who have plea bargained by offering information about people they know have committed criminal acts, are not always placed into protective custody. They are in great danger. Additionally, a recent report found private prisons overcharge detainees for phone calls. These prisons are paying prisoners just a dollar a day for their labor—I also was paid one dollar a day until this year. It’s a remarkable profit for the private prisons who also hold immigrants in these conditions, as well.

I believe that pretrial detention should be rethought for several reasons. Just as there are numerous private prisons where nonviolent immigrants have been deprived of bail, and they are manipulated and taken advantage of, the same is true for citizens. How can one justify the number of people held in America as flight risks? For myself and others held during the pre-trial period, how can you deprive us of bail? We are not dangerous criminals and are not a threat to others. Furthermore, the court has options regarding the monitoring of persons awaiting sentencing in the community. GPS devices can be used for surveillance, as well as home confinement. When someone is charged with serious, violent felonies, however, he or she might not need to be permitted to receive bail.

The courts should consider changing how the charge of conspiracy is defined and Congress should rewrite the laws related to it or do away with them altogether. The charge of conspiracy affects me in many different ways. Most notably, I have been deprived of my friends and possessions. Others have been deprived in the same manner. My friend was deprived of his family for ten years. His children depended on him for survival. Some incarcerated persons’ children end up not going to school. The government should take into account the plight of the spouses and children of those who
have been incarcerated. It is not only the people who are locked up that suffer, it is also the families. We should remember this.