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GUILTY UNTIL PROVEN INNOCENT:

THE ABUSE OF PRETRIAL DETENTION IN AMERICA

BY MARY DRYER

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"Leslie Chew spent his childhood working long days next to his father on the oil rigs of southern Texas. No school meant he never learned to read or write. Now in his early 40s, he's a handyman, often finding a place to sleep in the back of his old station wagon. But he got by — until one night in December 2008 when the station wagon got cold, and he changed the course of his life. "Well, I stole some blankets to try to stay warm," he says quietly. " [...] When I first spoke to Chew last summer, he'd been inside the Lubbock County jail since the night he was arrested: 185 days, more than six months. Chew is like one of more than a half-million inmates sitting in America's jails — not because they're dangerous or a threat to society or because a judge thinks they will run. It's not even because they are guilty; they haven't been tried yet. They are here because they can't make bail... Some will wait behind bars for as long as a year before their cases make it to court. And it will cost taxpayers $9 billion this year to house them. On the day that I meet him, Chew's bail is $3,500, or he could pay a bail bondsman a $350 nonrefundable fee to [make bail] for him. If he had either amount, he could stand up and walk out the door right now. But he doesn't. The money, says Chew, "is like a million dollars to me."

Leslie Chew didn't walk out of the Lubbock jail until eight months after he arrived, costing taxpayers $9,120. Prosecutors eventually gave him time served for his blanket theft. But there was a condition: He had to plead guilty to felony theft.

When he left, Chew found out his station wagon had been repossessed. Without a place to sleep, he wound up at a homeless shelter. A few months ago, he almost got a job as a maintenance man, but when the owners saw a felony conviction on his record, they pulled the offer.

In October, Chew walked back into the Lubbock jail and asked the night officer if he could have his old job back, cleaning the jail's floors. But those jobs are reserved for the half-million people in this country who can't make bail.

Nobody has seen Leslie Chew since.

— Laura Sullivan for National Public Radio, January 2010[1]

Although few principles of law are as widely lauded and univer-

sally accepted as the presumption of innocence, this principle is violated daily by a practice that has become standard in our justice system, exceptional only in how unexceptional it seems. Pretrial detention—the practice of holding a defendant in custody before trial while he or she is still entitled to the presumption of innocence—is, in its current status, a clear contradiction of this principle and a staple of the American legal system.

The premise seems sensible enough: if someone has committed a serious crime, it may be in the public's best interest to hold that person in custody until he or she may be properly tried. However, without proper monitoring and restriction the practice is liable to abuse. It is widely used in cases of petty crime (for instance, in 2008, "almost three out of four [defendants in New York] (71.1 percent) were accused of nonviolent, non-weapons related crimes"[2]), which is ethically questionable and empirically harmful to communities.

A Biased System

Exact procedure after arrest can vary from state to state, but in Pennsylvania, after an arrest without warrant, an accused person is supposed to be brought before a judicial officer [1] for a preliminary arraignment within forty-eight hours. If the issuing authority agrees that there is enough evidence to proceed with trial [2], bail is set, except in cases of especially violent crimes or ones in which the arrestee poses an imminent flight risk. If the arrestee is unable to post bail, he or she is typically held in custody until trial. While pretrial detention may not be overtly biased, by definition it disproportionately impacts the poor, to whom bonds are prohibitively expensive, and given the tendency of poverty and political marginalization to overlap, it adversely affects racial minorities as well. While the number of White people who are convicted and incarcerated slightly exceeds the Black population, there are five times as many Black people being held in remand.[3]

In addition to the conjunction of race and poverty, African-American defendants also have to contend with the kind of inherent biases in the legal system described below by the Justice Policy Institute:

"Research does show that the relationship or "interaction" between race and other factors, such as age, gender, and socioeconomic status, can directly impact pretrial decisions. For example, although a judicial officer may not give a high bail amount specifically because of a defendant's race, the person may have had difficulty getting a job due to his race, and thus, was rated as a higher flight risk due to an unstable source of income. As result, research shows that:

African Americans were less likely to be released on their own recognizance than white people

African Americans ages 18 through 29 received significantly higher bail amounts than all other ethnic and racial groups."

Perhaps the reason the public at large is so apathetic about pretrial detention is the perception that all or most detainees are people who have done something wrong; however, statistics indicate this "where there's smoke, there's fire" attitude is mistaken. Each year, reliably large portions of defendants are either acquitted or have the charges against them dismissed: slightly over one in five defendants were released, according to the Criminal Justice Agency of New York, in 2003-04. [3]

In Pennsylvania, even if assuming a best-case scenario in which the detainee is acquitted, he or she may wait up to 180 days for a trial—broadly speaking, ignoring the various terms and conditions which can lengthen the detention. If the arrestee works a low-skilled job with an hourly wage and high turnover, as we might infer given the connection described above between poverty and pretrial detention, then the 48-hour holding period between arrest and arraignment could easily cost the arrestee his or her job. In six months, who can say how far the detainee may slip from a productive, healthy life in general society? He or she could lose a job, custody of children, and quite possibly a home. In the case of an acquittal, there is no compensation whatsoever for lost wages and trauma.

Worse than Prison: A Cruel Irony

"Especially in resource-poor countries, pretrial detainees are likely to be confined with convicted prisoners. This exposes pretrial detainees to a hardened offender subculture, where violence, abuse,

and criminal gangs dominate daily life."

— *Presumption of Guilt: The Global Overuse of Pretrial Detention*

"It is, somewhat paradoxically, during the pre-trial period that a child or young person is likely to face the worst conditions of detention and when relevant standards are likely to be most abused. In comparison with sentenced juveniles, he or she is at much greater risk of, for example, being in contact with adults (e.g. in police cells), being held in unhealthy accommodation, lacking supervision by specially trained staff, being without an activity programme, and having to remain in closed quarters up to 23 or even 24 hours a day."

—UNICEF Office of Research

Since pretrial detainees have the presumption of innocence, pretrial detention should be less brutal than the incarceration of convicted criminals. However, the bitter irony of pretrial detention is that conditions detainees are subject to are often worse. Given the nature of pretrial detention in America—supposedly an impermanent place where people are housed only temporarily—the living conditions are almost universally worse than true prisons (which, of course, with an underfunded, overcrowded penal system, were never ideal to begin with). Not only do detainees lack adequate facilities for recreation, which are necessary in an institutional setting to provide the social and psychological stimulation all human beings require[4], they are also often left wanting for adequate sanitary facilities and health services. Any penal environment is vulnerable to HIV/AIDS, tuberculosis, and Hepatitis C due to what is called the "mixing bowl" effect ["putting [infected] and [uninfected] people together where sex and drug use is prevalent and where condoms and sterile injection equipment are rarely to be found"[5]], but high turnover and unsanitary conditions in detention facilities make managing infectious diseases particularly troublesome.

An arrestee who is detained is both more likely to be convicted and more likely to reoffend than his counterpart who is released on bail pending trial.

In some cases, detainees have been remanded to true prisons. While perhaps these facilities are better equipped, they carry their own hazards; housing detainees with violent offenders and hardened criminals is never a good idea. In 2015 the suicide of Kalief Browder made headlines by calling attention to the inhumane use of solitary confinement in prison. What many fail to realize is that Browder was a pretrial detainee, accused of stealing a backpack. Unable to pay $3,000 in bail to free himself, the sixteen-year-old black boy spent three years in Rikers, a maximum-security facility infamous for the grim conditions its inmates endure, almost two of them in solitary confinement, and in all that time he never once stood trial.[6] His is a horror story that most presume could never happen in this country.

Still more disturbing is the fact that pretrial detention has been found to empirically increase likelihood of conviction by 12% and likelihood of recidivism by 6-9%[7]; in other words, an arrestee who is detained is both more likely to be convicted and more likely to reoffend than his counterpart who is released on bail pending trial. Furthermore, according to the Pretrial Justice Institute, detainees are three to four times as likely to be sent to prison or jail (as opposed to non-custodial sentences) and to receive sentences two to three times longer than arrestees released on bond.[8] One explanation for the increased likelihood of conviction is that prosecutors frequently offer detainees plea bargains where the sentence is reduced to time-served, counting pretrial detention as time already served towards the defendant's prospective sentence. Because even a short stay in prison can have devastating consequences for an inmate's family and livelihood, some defendants are under pressure to accept pleas that are unfavorable, or even altogether untrue, rather than risk losing the case and serving the entire sentence.[9] Such a deal was offered to Kalief Browder, in fact: plead guilty to misdemeanor charges and be released on time served,

or go to trial and risk as many as fifteen years. Browder maintained his innocence. By the time his grossly overdue day in court finally came, the judge informed him that the District Attorney had decided to dismiss the case. He was sent home to his family, but never healed from the time he spent in prison. Six months after his release he attempted suicide for the first time. Numerous attempts at psychiatric intervention were made, all to no avail: in June of 2015, he cut his bed sheet into strips and hanged himself. He was twenty-two years old.

Alternatives to Detention

As it is used today, pretrial detention sacrifices an individual's right to due process and equal protection. It is in effect jailing someone for being poor, an appalling practice which violates all of America's lofty principles. Commercial bail bonds are available, but this booming industry is rife with misconduct; almost every country in the world has outlawed the practice, with the exception of the United States and the Philippines[10]. Even in cases where bondsmen do not abuse their power, for defendants who are not found guilty of any wrongdoing, the fee they pay to the bondsman (typically around 10% of the actual bond) is not refundable, even if the defendant is found not guilty. Fortunately, an ethical, effective, and inexpensive alternative exists.

Pretrial release programs assess defendants on an individual level and make recommendations to the court about conditions of release, based on a number of factors, for example: is the defendant an imminent flight risk? Does he or she pose a risk to the public? What is the likelihood of the defendant reoffending? If the defendant is released pending trial per the recommendation of pretrial services, these programs also monitor defendants remotely, through drug testing, ankle monitors, or even a simple phone call to remind the defendant of upcoming court dates.

Pretrial services are offered in all ninety-four federal districts. Although currently funded at the state level by only a few jurisdictions, those that do use pretrial release programs (based on qualitative *and* quantitative assessments) have had a great deal of success. In Kentucky, which executive director of the Pretrial Justice Institute Cherise Fanno Burdeen considers a "nationwide model…of progressive pretrial services,"[11] 90% of pretrial defendants released on the recommendation of pretrial services' risk assessment make all future court appearances and 92% do not reoffend while on pretrial release. This is infinitely preferable from an ethical perspective as well as a practical one; pretrial services cost taxpayers on average a mere $10 a day for remote monitoring, while housing and caring for a detainee costs $60 a day.

Conclusion

Imprisonment without charge seems like anathema to many, and so the practice of pretrial detention must be subject to heavy monitoring and restriction to prevent abuses. Making the extra effort to keep people accused of petty crimes out of jail is better for society: not only does it keep the defendant from lapsing into a cycle of desperation and crime, but it's also a sound financial decision. As the situation stands, however, here in the United States, insufficient attention has been dedicated to balancing the preservation of public safety with an individual's rights to due process. This is especially concerning in light of a new presidential administration, which has in the past shown that it prioritizes appearing tough on crime over preserving individual liberties. This suggests that we need to be extra vigilant at the state and local level and not expect federal intercession on behalf of pretrial detainees. For America to truly be the nation that we aspire to be, justice must apply to not only to those we consider virtuous, but also to those who have been charged with a crime.

[1] A magisterial district judge in Pennsylvania is not necessarily trained as a lawyer, and frequently may be a former law enforcement officer, which some might argue unfairly predisposes the magistrate to be a "hanging judge."

[2] Rule 540(E) of the Pennsylvania Rules of Criminal Procedure (which addresses the circumstance of a person arrested without a warrant) provides that:

If the defendant was arrested without a warrant pursuant to Rule 519, unless the issuing authority makes a determination of probable cause, the defendant shall not be detained.

However, the notion that the magistrate actually reviews the evidence and makes a substantive judgment during the preliminary hearing (as assumed above) about whether there is probable cause does not always hold true; in Allegheny County, the forms that are completed after preliminary arraignment do not even reference a determination of probable cause as it is standard to leave that to be determined at the preliminary *hearing,* as many as two weeks later.

Additionally, it is relevant to note that there are all sorts of caveats and loopholes to the "rules" regarding the timeframe that the accused may be held for, which are problematic in their own right. For instance, paragraph (C) of Rule 441 ("Procedure Following Arrest Without Warrant") specifically notes that the arrestee shall be presented to the 'issuing authority' *when available* (emphasis added). Also, weekends and holidays may be excluded from the 48-hour limit, and as the victim or witness must be present for the preliminary arraignment, theoretically someone could be arrested and sit in jail

[3] "According to the Criminal Justice Agency of New York, in 2003-04, in "22 percent of non-felony cases with a detained defendant, the defendant was ultimately acquitted or the case was dismissed." Among New York City defendants arrested in 2008 on non-felony charges and given bail under $1,000, 24 percent were acquitted. In England and Wales, around one in five pretrial detainees are acquitted. In New Zealand, too, about a fifth of all persons who spend some time in pretrial detention end up being acquitted of the charges against them. A review of cases coming before three large criminal courts in South Africa found that around half of arrestees end up being released because the charges against them are withdrawn."

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11 Interview with Cherise Fanno Burdeen, executive director of the Pretrial Justice Institute, June 9, 2015