

The Failures of Money Bail and the Need to Abolish It

On any given day in the United States, more than 450,000 individuals - presumed innocent and not convicted of a crime - are held in local jails awaiting trial. Most are there simply because they cannot afford bail.

Approximately 75% of all people incarcerated in jails in this country have not been convicted of a crime.¹ Pretrial incarceration is in part responsible for the net growth in the total correctional population in the United States over the past 20 years.² Much of this growth in pretrial incarceration is due to increases in the use of money bail. As the “front door” to our nation’s prison system, our local jails process more than 11 million people annually, and 3 in 5 are people too poor to afford the bail amounts set for them.³ The social and economic costs of the current bail system is staggering. With an annual price tag of more than \$15 billion, individuals, families, communities, and taxpayers are shouldering a high price for an ineffective system.⁴

Prosecutors are largely to blame for the ballooning incarceration rate over the last two decades due to their enormous charging discretion.⁵ Prosecutors play a significant role during the pretrial proceedings of a case. They have the power to change a person’s life in the matter of only seconds at a bail hearing.⁶ To be clear, judges (or magistrates), not prosecutors, are ultimately responsible for imposing bail⁷ (and they too have their own faults in perpetuating this failed system).⁸ However, prosecutors make strong advisory recommendations to the judge to impose either impose monetary conditions on release, allowing a defendant to return on their own recognizance, or a range of other options). More importantly, prosecutors are the ones who control who gets in front of a judge - they are responsible for charging individuals with crimes in the first place. They effectively decide who should and should not be prosecuted and hold a tremendous amount of influence over who comes into the criminal legal system to face the injustice caused by money bail.⁹

The money bail system is steeped in race and class bias and deeply flawed.

Money bail exacerbates the disparities of the criminal legal system.¹⁰ Black and Latinx defendants are detained pretrial at much higher rates than white defendants largely because of the burdensome and unaffordable bail amounts set.¹¹ Black defendants represent more than 43% of the pretrial jail population in the United States.¹² (For additional context, Black people make up only 12% of the total U.S. population, yet make up 33% of the total jail and prison population).¹³ Wealth and race in the United States are inextricably linked.¹⁴ Black and brown people are thus disproportionately impacted by the pervasive racial bias that effects prosecutorial and judicial decision-making during bail hearings, with prosecutors asking for inexplicable bail amounts for often low- to medium-level offenses¹⁵ and judges stereotyping defendants and overestimating the risk levels they pose. These decisions are often the result of risk assessment algorithms that are themselves racially prejudiced.¹⁶ The failures of the money bail system can be summed up in the tragic and preventable death of Kalief Browder, a 16-year-old accused of stealing a backpack.¹⁷ His story illustrates the unnecessary impact of the money bail system on the poor and disadvantaged. Unable to raise the initial \$3,000 bail, and a subsequent denial of bail because of the probation violation stemming from the purported theft, Browder spent 3 years (two in solitary confinement) in the notorious Rikers Island jail.¹⁸ Browder, like so many other defendants, are locked away and unable to adequately prepare their defense with their attorneys. Prosecutors repeatedly pressured him to take a plea deal, a practice that is unsurprisingly common with pretrial detainees. But Browder would not plead guilty to something he did not do. He wanted his day in court. After three years of delays, the charges against him were dropped and he was finally allowed to go home. Released from Rikers in 2013, Browder would take his own life two years later, a result of the repeated mental and physical traumas he suffered while in custody. This is but one of countless examples of the failure of the money bail system¹⁹ and the abuse of prosecutorial power.

The money bail system undermines the core constitutional principle of the presumption of innocence, or the right to liberty absent conviction of a crime.

The U.S. Supreme Court has affirmed that “liberty is the norm” and set fundamental guidelines for determining a fair bail.²⁰ These guidelines are commonly ignored. For those who cannot afford to pay, the money bail system has become a way of routinely subverting both the presumption of innocence and the right to liberty for any person who has not been convicted of a crime. The American Bar Association, in its standards on pretrial release, asserts, “The law favors the release of defendants pending adjudication of charges. Deprivation of liberty pending trial is harsh and oppressive, burdens defendants with economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support.”²¹

Money bail drives mass incarceration, extracts money from the poor, and makes us no safer.

People who are accused of a crime and are awaiting trial may be released on their own recognizance, released on a secured or unsecured bond, released under a certain condition or combination of conditions (i.e. participation in substance abuse program, electronic monitoring, in-person check-ins, and phone call check-ins, etc.), or detained. Bail is a financial incentive that is imposed to encourage an accused person to reappear for trial (and related court proceedings). If a defendant can post bail, they are released from jail and are obligated to show up for all required court dates in order to recover their bail payment.

The most common form of money bail is a secured bond or surety bond. A secured bond requires the defendant to post the full amount of the bail bond in cash or use real property (real estate equity) before the person can be released from jail. If a person does not have the total amount of money needed to post bail, they can hire the services of a bail bond agent. Usually, the bail bond agent requires the individual (or family) to pay 10% of the bail, which is never returned even if the case is dropped or the individual is acquitted. Individuals who are unable to pay the entire bail amount or cannot afford the services of a bail bond agent must remain in jail until trial. Therefore, money bail is often referred to as a form of wealth-based discrimination be-

cause an individual’s freedom is determined by their ability to pay.²²

From 1990-2009, the percentage of people charged with felonies who were required to pay cash bail for their release increased from 37% to 61%.²³ The sharp decrease in releasing people on their own recognizance and the corresponding increase in the requirement of cash bail as a condition of release has increased our total jail population and had a discriminatory impact on low-income and minority defendants. Money bail is listed as a condition of release more often for Black defendants than white defendants and Black defendants are often given higher bail amounts than whites.²⁴

This extremely biased system of money bail means that Black and Latinx people are more greatly impacted by the significant harms that occur as a result of pretrial incarceration.²⁵ People who are unable to afford bail have their economic and social well-being upended and destroyed as a result of their pretrial incarceration. They may lose their job, their homes, and custody of their children.²⁶ They also are less able to take part in their preparing their own defense, unable to regularly communicate with their attorney. Research shows that pretrial incarceration is associated with increased conviction rates and longer sentences.²⁷ Pretrial detention itself is also a significant factor in plea



bargaining, as prosecutors have used it as leverage to extract plea bargains from persons who cannot afford to pay for their release prior to trial. This unfair leverage and the limitless power it provides to prosecutors exacerbates the race and wealth inequality in the criminal justice system. It also does not make communities safer. Persons exposed to violence and trauma in jail are less able to successfully reintegrate into society and more likely to take part in crime.²⁸ Pretrial detainees released following acquittal or charges being dropped are even denied legal recourse to gain some measure of compensation for what the system took from them. This is an issue that must be revisited, as scholars have suggested, to ensure that prosecutors and the courts exercise more care in how they evaluate cases and rely on less restrictive alternatives than pretrial detention.²⁹

There are effective means of ensuring people appear for trial without money bail.

There is growing evidence of alternatives to money bail that are less onerous and more effective means of ensuring persons charged with crime return to court for their trials. Such alternatives include: reminders of upcoming appearance dates via calls, texts, and emails³⁰ and independent pretrial service agencies that provide

access to substance abuse and mental health services and to supportive services, such as childcare and transportation, to help ensure defendants can make their court dates.³¹ Where implemented, these types of solutions have proved to be at least as effective as money bail, often more so, and at lower cost to taxpayers, individuals, and the community.

Critical pretrial reform includes the presumption of release for all misdemeanor and non-violent felony crimes, and a prompt adversarial hearing and right to expedited appeal on the justification for pretrial detention for those not immediately released.

The U.S. Supreme Court prohibits state laws and practices that make a person's liberty dependent on their wealth.³² To protect that principle and the presumption of innocence, comprehensive procedural changes are needed to the pretrial system in the U.S. These include the presumption of release on recognizance for non-felony crimes and for persons not released automatically on their own recognizance, a prompt adversarial hearing with a right to counsel, and an expedited right of appeal. The purpose of the hearing would be to

assess whether the person presents a substantial and identifiable risk of flight or (where required by law) a specific, credible danger to individuals in the community. If not, the person must be released.³³

Bail reform has received bipartisan support in Congress and has garnered widespread support from a wide array of stakeholders in the criminal justice system, including: the American Bar Association, the National Association of Pretrial Services Agencies, the Conference of State Court Administrators, the National Association of Counties, the Conference of Chief Justices, the American Jail Association, the International Association of Chiefs of Police, the Association of Prosecuting Attorneys, and the National Association of Criminal Defense Lawyers.³⁴ Now is the time to act to end this harmful and deeply biased system, starting at the local level.

The Legal Defense Fund is calling on all District Attorneys to immediately end the practice of asking for monetary bail and limit pretrial detention and urges all prosecuting attorneys to support the elimination of money bail entirely. We are demanding that prosecutors exercise their discretion to build a more equitable and effective system that utilizes commonsense alternatives to money bail. We are demanding that prosecutors lead the way in expanding and optimizing the use of pretrial services to ensure that defendants have the least-restrictive conditions on their liberties during release. We are demanding that prosecutors support the elimination of risk assessment and other algorithmic prediction tools in all pretrial decision-making.

Prosecutors must recognize the effect that bail reform can have on mass incarceration and recognize the social and economic implications for eliminating this unjust and grossly discriminatory system.

Notes

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