

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 70% of all people incarcerated in jails in this country have not been convicted of a crime.¹ Pretrial incarceration has driven most of the net growth in jail populations in the United States over the past 20 years² and much of that growth is due to the increased use of money bail.³ 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.⁴ The social and economic costs of the current bail system are staggering. With an annual price tag of more than \$13 billion, taxpayers are shouldering a high price for a failed system.⁵

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

In the U.S., Black people make up only 12% of the population, yet comprise 33% of the total jail and prison population⁶ and more than 43% of the pretrial jail population.⁷ Black and Latinx individuals are detained pretrial at much higher rates than White people in part due to bias in charging and in setting bail⁸ but also because of the massive racial wealth gap in the U.S.⁹ which renders White defendants much more likely to be able to pay bail amounts than their Black and Latinx counterparts.

Prosecutorial and judicial decision-making during bail hearings reflect racial bias, with prosecutors frequently asking for extraordinarily high bail amounts for often low- to medium-level offenses¹⁰ and judges setting high bail amounts based on racial stereotypes and race-based overestimations of risk levels. These decisions are often the result of risk assessment algorithms that are themselves based on biased data.¹¹

The money bail system undermines the core constitutional principle of the presumption of innocence, and 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.¹² 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 those who have 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.”¹³

Money bail drives mass incarceration, extracts money from the poor, and makes us no safer.¹⁴

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 (e.g. participation in a 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 an individual to post the full amount of the bail bond in cash or use real property (real estate equity) **before** they 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 because an individual's freedom is determined by their ability to pay.¹⁵

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%.¹⁶ The sharp decrease in the release of 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 White defendants for the same or similar charges.¹⁷

Black and Latinx people are more impacted by the significant harms that occur as a result of pretrial incarceration.¹⁸ People unable to afford bail have their economic and social well-being upended and destroyed as a result of their pretrial incarceration. In addition to experiencing the horrors of incarceration, they may lose their jobs, their homes, and custody of their children.¹⁹ Unable to easily communicate with their attorney, they are less able to assist in the preparation of their own defense. Research shows that pretrial incarceration is associated with increased conviction rates and

longer sentences.²⁰

Pretrial detention itself is also a significant factor in plea bargaining, as prosecutors have used it as leverage to exact plea bargains from persons who cannot afford to pay for their release prior to trial. This unfair leverage and limitless power provided to prosecutors exacerbates the race and wealth inequality in the criminal legal system. At the same time, it 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.²¹ Pretrial detainees released following acquittal or dropped charges are 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 to pretrial detention.²²



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 emails²³ and independent pretrial service agencies that provide access to substance abuse and mental health services and to supportive services, such as childcare and transportation, that help ensure defendants can make their court dates.²⁴ Where implemented, these types of programs have proven 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 all non-violent crimes, and a prompt adversarial hearing and right to expedited appeal 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.²⁵ To protect that principle and the presumption of innocence, comprehensive procedural changes are needed to the pretrial system. These include the presumption of release on recognizance for misdemeanors and all non-violent crimes. For persons not released automatically on their own recognizance, they must be provided 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.²⁶

Bail reform has received bipartisan support in Congress and has garnered 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.²⁷

The Legal Defense Fund calls on District Attorneys to immediately stop asking for monetary bail and to support the elimination of its practice entirely. Prosecutors must embrace the presumption of innocence by making release on one's own recognizance the pretrial default for all individuals charged with non-violent offenses and must ensure that persons not immediately released get a prompt right to an adversarial hearing with counsel and an expedited right of appeal. Prosecutors must also support the elimination of risk assessment tools and other algorithmic prediction tools built on racially biased data in pretrial decision-making.

Notes

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- 7 Eli Day, *The Race Gap In US Prisons is Glaring, and Poverty Is Making it Worse*, Mother Jones (Feb. 2, 2018), <https://www.motherjones.com/crime-justice/2018/02/the-race-gap-in-u-s-prisons-is-glaring-and-poverty-is-making-it-worse/>; see Wendy Sawyer, *How Race Impacts Who Is Detained Pretrial*, Prison Pol'y Init. (Oct. 9, 2019), https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/.
- 8 See Sawyer, *supra* note 7.
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- 21 See Criminal Justice Policy Program, *supra* note 19, at 20.
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