

Bail Fail:

Why the U.S. should end the practice of using money for bail.

September 2012



INTRODUCTION

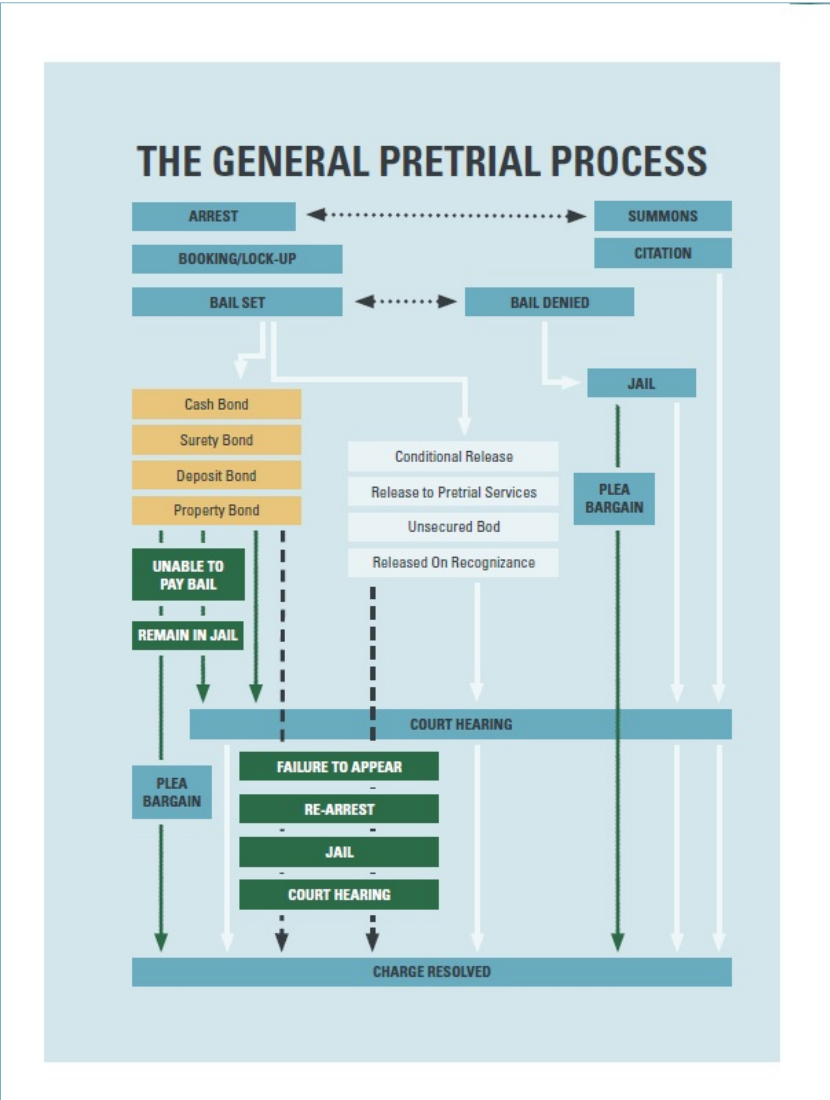
The vaguely understood pretrial process of bail costs the taxpayers of the United States billions of dollars and infringes on the liberty and rights of

millions of Americans each year. Fortunately, there are alternatives that states and localities can pursue that have been shown to effectively promote safety, deliver justice, and reduce the number of people in jails.

The use of money bail is among the primary drivers of growth in our jail populations. Between June 2010 and June 2011, nearly 12 million people were processed through jails across the United States. U.S. jails have operated at an average of 91 percent capacity since the year 2000.¹ On any given day, 60 percent of the U.S. jail population is composed of people who are not convicted but are being held in detention as they await the resolution of their charge. This time in detention hinders them from taking care of their families, jobs and communities while overcrowding jails and creating unsustainable budgets. In 2011, detaining people in county jails until their charge was resolved cost

counties, alone, around \$9 billion a year.²

The ability to pay money bail is neither an indicator of a person's guilt nor an indicator of risk in release. The focus on money as a mechanism for pretrial release means people often are not properly screened for more rational measures of public safety: their



“What has been demonstrated here is that usually only one factor determines whether a defendant stays in jail before he comes to trial. That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defendant. That factor is, simply, money. How much money does the defendant have?”

~ U.S. Attorney General Robert Kennedy

propensity to flee before their court date or their risk for causing public harm. Meanwhile, those too poor to pay a money bail remain in jail regardless of their risk level or presumed innocence. Evidence suggests that up to 25 percent more people could be safely released from U.S. jails while awaiting trial if the proper procedures are put in place,³ including valid risk assessments and appropriate community supervision.

THE PRETRIAL PROCESS: FROM ARREST TO HAVING A CHARGE RESOLVED

What pretrial process a person will go through depends on the state and jurisdiction in which he or she is arrested. States and jurisdictions have varying laws on detainment for capital offense charges, consideration of safety, and requirements around imposing the least restrictive bail conditions. The American Bar Association and the National Association of Pretrial Service Agencies have provided standards to guide pretrial activities; however, at this time, many practices do not yet comply with these recommendations.

As the flow chart shows, a person may be released from jail to await his or her trial through a variety of mechanisms. Financial release options require a person to post a bond that will pose an expense to them: cash bond (pay the full bail amount), deposit bond (pay a percentage of the bail amount), property bond (submit a deed that allows the court to place a lien on a property), or surety bond (a for-profit bail bonding company provide a promissory note for a non-refundable fee). Non-financial release options include release-on-recognizance (a promise to return to court), conditional release (release under stipulations), release to pretrial services

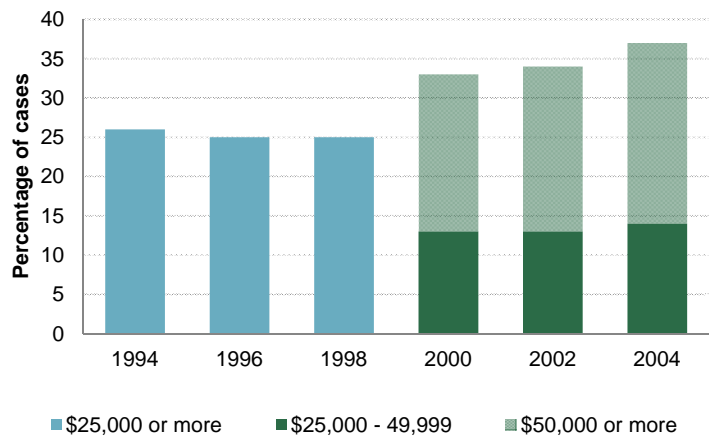
(conditions set by a supervising pretrial service agency), and unsecured bond (the person will be liable for a fee if he or she missed the court hearing).

THE USE OF MONEY BAIL

From 1992 to 2006, the use of financial release, primarily through commercial bonds, increased by 32 percent. Release on recognizance was the most common type of pretrial release in 1992; however, its use had declined by 33 percent by 2006. Overall, 70 percent of people charged with a felony were assigned money bail in 2006.

Bureau of Justice Statistics data show that average bail amounts have increased by over \$30,000 between 1992 and 2006.⁴ In 2006, jail population in the 75 most populous U.S. counties had a median bail amount of \$10,000 which means that at least half of the population was assigned a minimum of \$10,000 in bail.

An increasing number of cases are assigned high bail amounts.



The use of money bail disproportionately impacts low-income communities. People with few financial resources may not have the capacity to pay a cash bond or even to pay a 10 percent

fee to a bondsman to secure their release. As a result, they will remain in jail until their charge is resolved (typically through a plea deal.) Pretrial detention has a documented negative impact on pretrial and case outcomes.

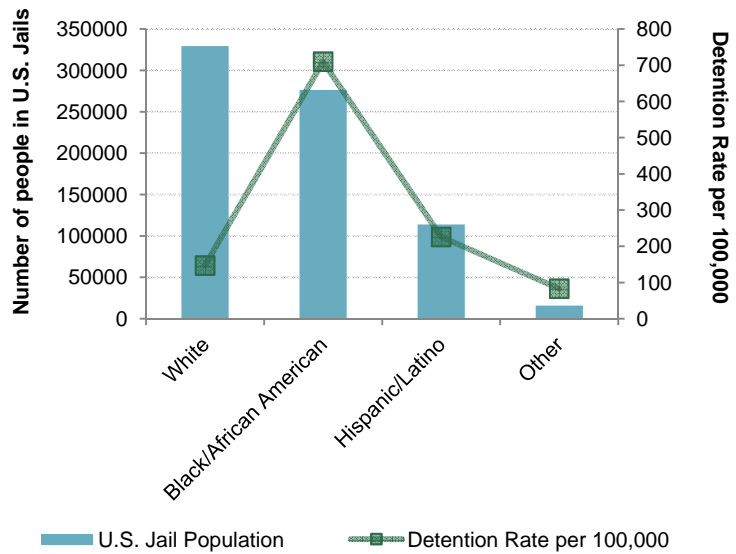
Those held pretrial are more likely to be convicted of a felony,⁵ receive a sentence of incarceration, and be sentenced longer than those released pretrial.⁶ When held in jail, a person is not able dress as presentably as one who is able to come from their own home dressed and prepared.⁷ Jurors who see people in jail uniforms and shackles may be biased as being in jail is equated to dangerousness and guilt.⁸ People held in jail are not able to work with their counsel to prepare their defense, gather witnesses, and other activities needed to present a strong case due to limited phone use, obligations to work long shifts in jail programs,⁹ placement in jails long distances away from their counsel,¹⁰ and other reasons.

People in pretrial detention may lose their job due to their absence;¹¹ and if they are self-employed, pretrial detention effectively shuts their business down. Pretrial detention causes some people to lose their housing.¹² They may suffer a disruption in their medical care and may even lose their health insurance due to being in jail.¹³ Their families are often adversely impacted, as their children may have to move to another parent or relative's home, suffering disruptions in their education and home life, as well as the trauma of having an incarcerated parent.¹⁴

Due to disparities in the pretrial process, African American and Latino populations are more impacted by the use of money bail.

Annual jail populations show that a higher number of white people are in jail; however, considering that the black population only

The racial and ethnic breakdown of detention rates reveal serious racial disparities in pretrial detention.



comprises 12 percent of the total U.S. population, it is disturbing that they comprised 38 percent of the U.S. jail population in 2012. Estimates show that the rate of Black/African American people being detained in jail was nearly five times higher than white and three times higher than Hispanic people.¹⁵

Studies provide conflicting findings on whether “race” directly predicts pretrial decisions, but 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.¹⁶
- African Americans ages 18 through 29 received significantly higher bail amounts than all other ethnic and racial groups.¹⁷

Awareness of how this may happen at the bail setting stage is crucial for reducing disparities due to pretrial decisions, particularly as there is little oversight of decision making processes at this phase. The U.S. Supreme Court has affirmed the pretrial process as “perhaps the most critical period of the proceedings”,¹⁸ so the relationship between race and decisions at this phase is of particular importance.

The use of money bail is arbitrary and not guided by the use of risk assessments or national standards.

Each jurisdiction has a measure of discretion in determining how money bail will be used in the criminal justice process. Consequently, each jurisdiction differs on how they determine what types of bail to set, how much money bail is set, and the payment methods allowed to secure one’s release.

Some jurisdictions use “bail schedules” or “bond schedules” to determine money bail amounts. Bail schedules are intended to standardize how much bail is set for an alleged offense regardless of the person’s personal characteristics or demographics.¹⁹ There is no official guideline for the judges and officials who make up the schedules; consequently, even within a state, the amount of bail set for a charge may vary widely. The use of bail schedules is problematic because

there is no definitive association between a particular charge and the amount of money that would guarantee appearance at court or deter future criminal activity. Hence, the bail amounts are arbitrary and cannot guarantee safety in the community, and are unrelated to a person’s financial means.

MONEY BAIL AFFECTS THE JUDICIAL PROCESS

The proportion of people in pretrial detention increased by about 14 percent to a high of 42 percent of all those charged with felonies in 2006 (only 5 percent of these were held without bail).²⁰

An inability to pay the money bail may coerce people to plead guilty so that they can get out of jail sooner despite being innocent. People detained due to money bail are also put under greater pressure to enter a plea bargain, which has become the *de facto* standard in resolving more than 95 percent of cases each year. For various reasons, prosecutors can and often do ask judges for pretrial detention as leverage in plea-bargaining discussions with people of limited financial resources. People with children at home, a job or housing at stake, or a desire to avoid harmful jail conditions could be and have been coerced into entering a guilty plea to avoid pretrial detention even if they were innocent. A plea may be particularly appealing if the time they have already spent in jail will count toward the prospective sentence.²¹

Conviction rates for people charged with felonies stood at 68 percent in 2006 with 96 percent of those convictions a result of guilty pleas. Only 3 percent of those cases actually went to trial.²²

A 2012 study suggested that in an effort to avoid the ominous maximum penalties of a

potential conviction in an inherently coercive²³ and unfamiliar system, more than 50 percent of innocent defendants pled guilty to get a lower sentence rather than risk a conviction, albeit faulty, that would lead to the maximum penalty.²⁴ This means that in 2006, over 16,875 people could have been wrongly convicted.²⁵

THERE ARE EFFECTIVE ALTERNATIVES TO MONEY BAIL

Research shows that in many of the largest U.S. jurisdictions, around half of those kept in jail would have been less likely to be rearrested than those who had been released.²⁶ With proper screening mechanisms, an additional 25 percent of people could be released pretrial without increasing offenses or failures to appear.²⁷

There are vastly more effective and cost-saving practices that should replace money bail as our primary release mechanism. By implementing more effective and efficient programs and services, various jurisdictions across the U.S. are demonstrating the cost savings and enhancement of community safety that could be gained.

- Valid risk assessments
- Citations and summons instead of arrest and booking
- Informed Release-on-Recognizance
- Appropriate, informed conditional release
- Effective pretrial service agencies risk assessments and supervision services
- Court notifications

A Pew Center on the States study showed that 84 percent of surveyed American voters believed that community-based programs could be better used instead of relying on incarceration for people convicted of low-level, nonviolent offenses.²⁸ A study of people

Up to **25 percent** more people could be safely released from jail while waiting for their charge to be resolved.



in a large, Southern metropolitan area showed that 60 percent believed that writing a citation would be preferred over arresting a person for a low-level, nonviolent charge. They also supported the idea of releasing people to pretrial supervision over requiring a money bond or releasing on recognizance alone.²⁹

Measures of pretrial detention should be implemented to provide national measurements of our pretrial processes and drive pretrial reform efforts.

Because national data for measures of pretrial performance and outcomes are not collected, it is difficult to understand how pretrial processes affect the system, develop meaningful policy to drive change and protect effective services already in existence. Currently, no data is being collected in a standardized way regarding neither pretrial detention nor pretrial services across the nation.

RECOMMENDATIONS

1. **Eliminate money bail.** To ensure a strong, fair, and cost-effective pretrial justice system, jurisdictions should take the necessary steps to eliminate the use of money bail. This can be accomplished by a reduced reliance on financial release options and a return to non-financial release such as release on recognizance. The growing use of validated risk assessments make the need for money bail even less necessary as people can be ranked according to potential risk and released appropriately. Elimination of money

bail should also be achieved to ensure that thousands are not needlessly detained each year because they cannot afford to pay for release – causing a burden to their families, their communities, and jurisdiction budgets.

2. Ban for-profit bail bonding companies.

For-profit bail bonding companies have an interest in preserving the use of money bail as it is the source of their income. Jurisdictions should do away with this unnecessary third party in the judicial system by relying on non-financial bail options and utilizing safer not-for-profit pretrial service agencies.

3. Include the voices of all involved parties to ensure that reforms to the pretrial process are meaningful and effective. As the impact of harm varies depending on the offense, a systematic consideration of the victims and their advocates' perspectives or guidance could enhance bail decisions and improve safety in the community. The use of money bail should be examined so that it does not lead to further harm on victims; this will require close communication with victims and their advocates.

4. Expand community education programs, such as the Neighborhood Defendant Rights programs, that inform people in the community about how to navigate the pretrial process.

Communities, particularly those disproportionately impacted by the criminal justice system, should be informed about the pretrial process, their legal rights, and what to practically expect should they or a loved one be arrested.

5. Use citations and summons to reduce the number of people being arrested and processed through jails. Police officers should be enabled to give

citations or summons in place of arrest and booking for certain offenses, particularly misdemeanor offenses. The use of risk assessment and technology allowing finger printing and positive identification of a person accused of an offense can enable officers to implement this practice safely.

6. Use standardized, validated risk assessments to determine who to release and how to release. Every jurisdiction should invest in a validated risk assessment for their locality. Validated risk assessments should be implemented to provide judicial officers an objective, informative tool with which to drive their pretrial decisions. These tools are also useful in citation programs when police officers want to ensure the person they “cite and release” will not pose a risk to the safety of the community.

7. Implement measures of pretrial detention and release services to evaluate current programming and better inform pretrial reform efforts. The U.S. and each jurisdiction should gather more robust data regarding pretrial detention and release to better assess and reform their practices.

8. Require for-profit bail bonding businesses to report on pretrial measures that better track forfeiture rates, FTA rates, and other pretrial performance and outcomes indicators. Should for-profit bail bonding companies be allowed to continue, they should be required to provide data that is crucial to maintaining the safety of our communities, including bond amounts of people released, forfeitures, and failure to appear rates of their clients. Notes should also be made if a bond is posted on behalf of someone who is also on conditional release or

under the supervision of a pretrial service agency.

9. Expand pretrial service agencies.

Pretrial service agencies should be expanded to assist judicial officers in pretrial determinations, as well as, provide pretrial supervision services to those who may be at risk for not being able to successfully complete the pretrial process on their own.

10. Use court notifications.

Court notification systems should be a part of every court budget to ensure dollars are not spent trying to track or punish people for failures to appear unnecessarily.

11. Research the effectiveness of current and proposed pretrial practices to ensure the activities will lead to desired outcomes. More research should be conducted to objectively confirm the impact of current pretrial

practices on those who are accused of offenses and their families, but also on society and the costs incurred

12. Amend the Bail Reform Act and policies to comply with the Equal Protection Clause.

Current practices should be changed to ensure that all people accused of similar offenses receive the same pretrial treatment regardless of their access to money or financial resources.

13. Better utilize technology to improve pretrial processes. Technology should be used to overcome barriers and more easily implement safer practices. Technology can be used for conducting risk assessments, obtaining positive identification, as well as, creating and testing models for potential pretrial changes to predict potential benefits.

¹ Todd D. Minton, "Jail Inmates at Midyear 2011 – Statistical Tables," Bureau of Justice Statistics, NCJ 237961, 2012, <http://www.bjs.gov/content/pub/pdf/jim11st.pdf>.

² Eric Holder, "Attorney General Eric Holder Speaks at the National Symposium on Pretrial Justice," June 1, 2011, U.S. Department of Justice, <http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-110601.html>.

³ *Ibid* (shima), 2011.

⁴ *Ibid*.

⁵ Mary T. Phillips, "Pretrial Detention and Case Outcomes, Part 2: Felony Cases," New York City Criminal Justice Agency, Inc., March 2008.

⁶ Marian R. Williams, "The Effects of Pretrial Detention on Imprisonment Decisions," *Criminal Justice Review*, 28(2):299-316.

⁷ Douglas J Klein, "The Pretrial Detention 'Crisis': The Causes and the Cure," *Journal of Urban and Contemporary Law*, 52(1997): 14.

⁸ *Ibid*, 1997, p. 293.

⁹ <http://abcnews.go.com/US/man-alleging-prison-labor-violated-anti-slavery-amendment/story?id=16970464&page=2#.UCqso0S5J3M>

¹⁰ Douglas J. Klein, 1997, p. 294.

¹¹ Robert F. Kennedy, "Testimony by Attorney General Robert F. Kennedy on Bail Legislation Before the Subcommittees on Constitutional Rights and Improvement in Judicial Machinery of the Senate Judiciary Committee," Department of Justice, August 4, 1964, <http://www.justice.gov/ag/rfkspeeches/1964/08-04-1964.pdf>, p. 3.

¹² The Abell Foundation, 2001, p. 25.

¹³ Amanda Gullings, "The Commercial Bail Industry: Profit or Public Safety?," Center on Juvenile and Criminal Justice, May 2012.

¹⁴ David Berry, 2011, 29.

¹⁵ Estimates based on population statistics from Table 1 in Karen R. Humes, Nicholas A. Jones, and Roberto R. Ramirez, "Overview of Race and Hispanic Origin: 2010," *2010 Census Briefs*, March 2011,

<http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf> and jail population statistics from Table 6 in Todd Minton, 2012, p. 6. Estimates are lower than actual rates as they are based on total population statistics and not limited to adult population statistics.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ <http://law.justia.com/constitution/us/amendment-06/17-right-to-counsel-in-nontrial-situations.html>

¹⁹ Lindsey Carlson, "Bail Schedules: A Violation of Judicial Discretion?" *Criminal Justice* 26 (2011).

²⁰ State Court Processing Statistics data as retrieved from the Felony Defendants in Large Urban Counties reports, 1992 – 2006.

²¹ Barry Mahoney and others, 2001, p. 16.

²² State Court Processing Statistics data as retrieved from the Felony Defendants in Large Urban Counties reports, 1992 – 2006.

²³ Q&A session of The Burden of Bail: Addressing Challenges to Indigent Defense at Bail Hearing.

²⁴ Lucian E. Dervan and Vanessa Edkins, "The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem", May 31, 2012, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2071397.

²⁵ This estimate made by calculating 50 percent of the 65 percent of defendants who plead guilty in 2006; Thomas H. Cohen and Tracey Kyckelhahn, "Felony Defendants in Large Urban Counties, 2006," (Washington, D.C.: U.S. Bureau of Justice Statistics, May, 2010).

²⁶ Shima Baradaran and Frank McIntyre, 2011, p. 24.

²⁷ Ibid, 2011, p. 24.

²⁸ Public Opinions Strategies and The Mellman Group, "Public Opinion on Sentencing and Corrections Policy in America," Pew Center on the States, March 2012.

²⁹ Marketwise, "Charlotte-Mecklenburg 2012 Criminal Justice System Survey Presentation of Results," Charlotte, NC, April 1, 2012.



The Justice Policy Institute is a national nonprofit organization that changes the conversation around justice reform and advances policies that promote well-being and justice for all people and communities. To read the full report, *Bail Fail: Why the U.S. should end the practice of using money for bail*, please visit www.justicepolicy.org or contact us at Justice Policy Institute 1012 14th St. NW, Suite 400 Washington, DC 20005 Phone: (202) 558-7974 or at info@justicepolicy.org.