

No Money, No Freedom: The Need for Bail Reform

**ACLU of Washington
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The U.S. imprisons people at a higher rate than any other nation on earth. In doing so, we cause great damage to the lives of millions of Americans. A fair and just society is one that substantially reduces incarceration, using it only when no other options can keep us safe.

The ACLU of Washington is working to advance major, systemic changes to our criminal justice system that will promote freedom and fairness for all, paying particular attention to the rights of those most marginalized. Having spent a year examining our state's bail system and connecting with stakeholders statewide, we have found an urgent need for major reform of the pretrial system and bail practices in Washington.

Locking up people before trial because they cannot afford to pay bail is a leading cause of mass incarceration in Washington state and elsewhere. Reforming our state's treatment of people before trial, including the use of money bail, will result in fewer people unnecessarily held behind bars. This is why advocating for fair and effective alternatives to pretrial detention is an important part of the ACLU of Washington's Campaign for Smart Justice. This paper discusses problems with our current system and offers broad recommendations for reform.

Jaime Hawk
Legal Strategy Director
ACLU of Washington's Campaign for Smart Justice

“In our society, liberty is the norm,
and detention prior to trial or without trial
is the carefully limited exception.”

Salerno v. United States
481 U.S. 739 (1987)

Introduction

A person’s financial resources should never determine whether he or she sits behind bars. Unfortunately, this is exactly what is happening in our state. Some people routinely are incarcerated before they even stand trial because they can’t come up with the money for bail.

In Washington counties where data is available, approximately 60 percent of the people in county jails at any given time — thousands of people — have not been convicted of a crime.¹ They are locked in jail simply because they cannot afford the amount of bail set by the judge. This high rate of pretrial detention exists despite the fact that Washington court rules generally mandate the release of people accused of crimes before trial.

Current practices that force people to stay in jail before their trial are contrary to the fundamental American principle that one is innocent until proven guilty. Accused people who can’t afford bail are instead treated as if they have already been tried and convicted.

Judges in Washington often impose bail at an amount much higher than many people can afford to pay, and without consideration of individual financial circumstances and resources. This practice is a glaring example of the reality that, for people facing criminal charges in our state, there are two systems: one for the wealthy and one for the poor. This two-tiered approach denies justice to individuals, undermines the fairness of the court system, and imposes unacceptably high costs on the accused, their families, and our communities. It also is in stark contrast to the practice of federal courts, which reformed the unfair use of money bail 50 years ago.

This injustice is getting worse. Since 2000, 95 percent of the growth in the overall jail inmate population in the U.S. was due to the increase in the number of people in jail awaiting trial.² In recent years, courts have been setting bail amounts higher and higher.³ In Washington, many of these jailed persons are accused only of low-level crimes.

The original purpose of bail was as a deposit intended to ensure that the accused person would return to court for trial. Today, money bail has become an excessive financial burden, one so great that it prevents the accused from getting out of jail while his or her case is pending.

A court’s decision to release an accused person before trial is one of the most critical decisions made in a case. Keeping people in jail before their trials seriously harms their prospects in court.

People who are locked up are less able to assist their attorneys in preparing a defense. To make matters worse, judges sometimes set bail before the accused person has even been assigned an attorney who can advocate for the client's release.

Individuals jailed even for a few days before trial are more likely to receive a sentence of jail or prison, and for a longer time, than those who are free before their trial. Keeping a person in jail may also prevent a trial from even occurring: The loss of income, possible loss of employment and housing, disruption of prescribed medications, and stresses on one's family that accompany incarceration have induced many defendants to accept a plea bargain to get out.

Poor people, people of color, and people with certain disabilities are disproportionately affected by the unfairness of bail. They are more likely to be held behind bars before trial, and this leads to a greater likelihood that they will be convicted and incarcerated.

The use of money bail is not the only means to ensure that a person will appear at future court hearings. Courts can impose non-financial conditions such as reporting to a pretrial services office or maintaining employment, training, or education routines to keep track of persons awaiting trial. The federal court system and other states have implemented some of these practices and developed better pretrial systems.

There is a growing national movement to reduce the costly use of pretrial detention and of overcrowding in jails, and to design new systems for people prior to trial. It is time to reform pretrial and bail practices in Washington. Doing so will increase the fairness, integrity, and effectiveness of our criminal justice system.

What Is Money Bail and How Does It Work?

After someone is arrested, he or she appears in court, where a judge decides whether to release the person before trial and under what conditions, if any. The judge may release an accused solely on a promise to appear, release the individual under certain conditions that are tailored to ensure a person returns to court, or impose a requirement that the person pay some amount of bail – an amount of money deposited with the court intended to guarantee that the person returns for future court hearings.

When the court imposes bail, it is usually in the form of cash or surety. Cash bail is paid to the court and returned to the accused after he or she appears for all hearings and the case is over. A court may accept cash bail either as an “unsecured bond” that is simply a promise to pay the cash payment if the accused fails to appear for a court hearing, or as an “appearance bond” where the court accepts cash payment of up to 10 percent of the bail amount.

Most accused persons cannot afford the amount of cash bail on their own, so the court may authorize different forms of payment, such as a “surety bond.” A surety bond is a promissory note from a bail bondsman to the court for the entire bond amount. Given current practices, a surety bond is the most common, and most unfair, way used to pay bail.

The Role Bail Bondsman Play

The primary role of the bail bondsman is to insure the payment of surety bail. Before insuring the cost of the bail, a bail bondsman requires an accused person to provide personal or family collateral in the amount of the bail. Often the collateral is a family member’s house or car; the typical contract says that the bail bondsman can sell the collateral if the accused person fails to appear at future court hearings. The bail bondsman also charges a non-refundable fee that is typically 10 percent of the bail amount. This fee or “premium” is the bail bondman’s profit and is never returned. The national bail bonds industry does \$2 billion in business annually.⁴ If an accused person lacks the collateral or cash to pay a bail bondsman, the person remains jailed.

Why Our Bail System Is Unfair

Jails are increasingly filled by people who have not been convicted of a crime. Ninety-five percent of the growth in the U.S. jail inmate population since 2000 was due to the increase in the number of people being held before trial.⁵ In Washington, often these jailed persons are facing low-level misdemeanors. They are routinely held because bail is set at an amount they cannot afford to pay.

Under our state's current court rule which presumes the release of the defendant, bail is supposed to be imposed as the last resort.⁶ For some judges, however, bail has become the first and only option. The rise in pretrial detention is often a result of judges not following the court rule.

a. For many in America, bail is out of reach

Not only are courts failing to follow the rules requiring release of individuals, but courts also are increasing bail amounts for those who are detained. Between 1992 and 2009, there was a 43 percent increase in constant dollar values in the amount of bail imposed in felony cases in the 75 largest counties in the U.S., a sample that includes King County, Washington.⁷

The bail amounts for most criminal cases—and the amounts required by a bail bondsman—are out of reach for much of the population. In a sample Washington county, bail amounts averaged in 2014 between \$5,000 to \$50,000 depending on the offense.⁸ The amount of bail imposed can vary by county and court. In a recent study, 47 percent of respondents said they either could not cover an emergency expense costing \$400, or would cover it by selling something or borrowing money.⁹ Bail is just the sort of emergency expense that most Americans cannot afford. So, under current bail rates and practices, most Americans are vulnerable to being kept locked up before trial if they should ever face criminal charges.

b. Poor people often lack a lawyer at their first court appearance

Representation by an attorney is vital to ensuring fairness for people accused of crimes. This is especially true in bail hearings. The decision to release or jail the accused before trial is one of the most critical decisions a judge makes, as it can decisively influence the course a person's case will take.

A judge typically makes the decision to release or jail the accused on bail at the first court hearing. At this point, the court has limited information about the defendant. A defense attorney who has had time to talk to the accused person and contact family members, employers, or other supporters can provide the judge with the information needed to justify releasing the person or to set reasonable conditions that ensure appearance at future hearings.

In many city and county courts, a judge sets bail before the defendant is appointed a lawyer. This puts poor people accused of crimes at a disadvantage from the very beginning of their case. Even in jurisdictions that do have a public defender representing an accused person at this initial

appearance, the public defender is often covering a full case docket and lacks specific knowledge of a client's needs. The attorney handling the docket usually has less than one minute to meet with each person before the court hearing and bail determination, which is an insufficient time to prepare adequately on behalf of the accused.

c. People of color and people with disabilities are more likely to be held on bail

Not all Washington counties consistently collect data on the race of the people incarcerated in their jails. However, sample county data that has been collected in Washington shows that people of color are jailed before trial at a higher rate than white people.¹⁰ Also, according to national research people of color are assigned higher bail amounts.¹¹ People with disabilities are also more likely to be jailed before trial. Nationally, approximately 40 percent of the overall jail population is made up of people with disabilities.¹²

Implicit bias may also play a role in who is assigned bail and how much bail is ordered. Assumptions based on a defendant's appearance, background, or ethnicity may unconsciously and erroneously lead a judge to determine that an accused person is more likely to fail to appear in court or pose a danger to the community.

A money-based pretrial system poses inherent disadvantages to people of color living in poverty. Factors such as not having a stable residence, employment, or family support may also influence a judge's decision on whether to detain a defendant on bail. These considerations do not reliably determine whether someone will appear for their court dates. While seemingly objective, considerations such as these can lead to people of color or people with mental health or other disabilities being treated differently.

There are better ways to increase court appearance rates. For example, several courts have implemented automated court hearing robocall systems to remind people of their upcoming court dates. Instead of imposing unaffordable money bail, reforms such as this can reduce disparities and more equitably ensure return to court.

Uneven Playing Field: Outcome of Cases Are Worse for People Who Are Jailed Before Trial

a. Less able to help their attorney

The Constitution requires that a person facing criminal charges be able to meaningfully assist defense counsel. People who have been jailed before trial are at a disadvantage because being behind bars makes it difficult to fully assist one's attorney and participate in one's own defense. It is harder to meet and discuss the case. It is more challenging to review the evidence in the case and to work with defense investigators. Generally, the less interaction a client has with the defense attorney during the case investigation and trial preparation, the more disadvantaged the client is in his or her defense.

b. More likely to be convicted

People who are detained on low-level misdemeanor charges face great pressure to plead guilty just to get out of jail. Studies have shown an increased likelihood of being convicted when one is detained before trial.¹³ When individuals are jailed, especially on a lower-level criminal charge, their focus tends to be on regaining freedom. The immediate consequences of being away from family, work, and other obligations can often outweigh the future consequences of a criminal conviction in the mind of the accused. Defendants will, at times, plead guilty to, and be convicted of offenses, even when they would not be convicted at trial.

Even if a person did not commit the offense charged, defendants may view it to be in their interest to plead guilty with credit for time served instead of being jailed for months awaiting trial. This may be so regardless of the barriers to employment, housing, and economic stability that accompany convictions.

c. Less likely to have a trial

Every person accused of a crime has a constitutional right to trial. But whether a case is likely to go to trial may at times depend simply on whether the defendant is locked up beforehand.

For someone jailed, the prospect of spending months behind bars awaiting trial is a significant deterrent to exercising their right to have a trial. Jail is a stressful, unhealthy place to be, and people tend to want to get out without delay. Sometimes even an innocent person will come to the point where getting out of jail is more important than exercising their right to trial, a factor which makes them more vulnerable to being pressured into accepting a plea agreement. Staying in jail and awaiting trial for a low-level misdemeanor, in particular, sometimes results in more time in jail awaiting trial than the normal jail sentence for that offense. For those who are jailed on bail, a trial becomes more of a luxury than a right.

Moreover, prosecutors may decline to file charges or may decide to dismiss a case due to insufficient evidence or a finding of innocence. In these cases, people who are jailed for lack of money bail have been punished without ever being convicted.

d. More likely to get a harsher sentence if convicted

Research has established a causal relationship between pretrial detention and unfavorable case outcomes. One empirical study shows that people jailed before their trial receive sentences that are almost five months longer than those who are not jailed before trial.¹⁴

A prosecutor is more likely to recommend, and a judge is more likely to impose, a shorter sentence to someone who was free before trial and was able to demonstrate good behavior in the community and successful participation in treatment or services.

At sentencing, a defense attorney's key argument is to show the ways a client is doing better compared to how the individual was at the time of the offense. To establish this, a defense attorney will typically point to a client's demonstrated good behavior and participation in treatment and other services while awaiting trial and sentencing.

Those who await trial behind bars cannot show they have improved. Only people not jailed on bail have an opportunity to complete out-patient treatment, employment, and educational programs that can signal they are deserving of a lesser sentence.

Moreover, it is human nature for a judge to more readily extend the jail sentence for someone currently in jail than to send him or her to jail for the first time. This is because the impacts of incarceration on a person are most visible when a free person is ordered to jail, as opposed to when a jailed person's detention is extended. For this same reason, a judge would be more likely to give probation or an alternative jail sentence to someone who is not in custody than to someone who is jailed on bail.

IV. Pretrial Detention Hurts Individuals, Families, and Communities

a. Jail causes stress

The stress, worry, and isolation brought on by even a few days of incarceration can cause a person's mental state to deteriorate. The emotional distress suffered by an individual who is detained before trial is often compounded by a loss of control of their affairs. People in detention may realistically fear that, while they sit in jail, other parts of their lives are unraveling.

b. Jail causes financial problems

1. Loss of employment

People jailed awaiting trial cannot work or earn income and even a brief absence from work may cause them to lose their jobs. If the period of detention is lengthy, their future earning potential is also undermined. Those who are self-employed are at risk of bankruptcy. Indeed, the stigma of jail, combined with lost education or training opportunities, may severely limit lifetime income potential.

2. Loss of housing

Pretrial detention can jeopardize a person's housing. He or she may miss a rent or mortgage payment, resulting in late fees or eviction. Homelessness can result. Those who are already homeless may lose their space in a shelter or a place in line for permanent housing if they are not available to claim it.

3. *Loss of education*

Many people jailed before trial are young adults, some of whom will have their education interrupted as a result of their detention. Others may have their job training interrupted, making it harder to find a job upon release. Even the education and training opportunities available for those in prison are rarely found in local jails where accused individuals are detained before trial.

4. *Loss of public benefits*

Pretrial detention often results in the loss of state and federal public benefits. For example, social security benefits may be limited or cut off based on a jail residency.¹⁵ Medicaid also limits services for those in jail. Many states will take an individual's name off the Medicaid roll when they are jailed or when they learn that Social Security payments have stopped as a result of incarceration.¹⁶

c. Jail harms children

Separation from one's family can strain communication and fray relationships. People who are detained are less able to give and receive emotional support. Parents who are unable to find caregivers for their children may lose custody of them. These stressors can cause severe mental anguish that exacerbates psychological and social problems. Although someone's pretrial detention may last only a few weeks, the impact often persists over a lifetime — and even into the next generation. A parent's incarceration often disrupts the education of children, especially when mothers are incarcerated. Children may have to take on new roles, including providing domestic, emotional, or financial support for other family members.

d. Jail harms families

When job loss results from pretrial detention, a family often pays the price. In some cases, the spouse or partner — and even children — must find work to make up for the lost income. Demands imposed by incarceration, including court appearances and jail visits, may hinder the spouse or partner's ability to work. The financial strains, combined with emotional strains, may seriously stress the marriage itself. And parents, or even elderly grandparents, may have to step into the breach to provide significant childcare and financial support.

e. Jail harms health

Health services are frequently limited, inadequate, or even nonexistent in county jails. People detained before trial may be denied their own prescribed medications, which disrupts their treatment and may cause additional health complications.

Once booked at a jail, people who have diagnosed mental illnesses are often forced to wait days or even weeks before they are provided their prescribed medication.¹⁷ This can cause mental

health to significantly deteriorate. People with mental illness who are not yet diagnosed are unlikely to have their illness diagnosed or treated during pretrial detention, as county jails do not provide such services.¹⁸ County jails also lack the conditions most likely to contribute to improved mental health — namely, an atmosphere of protection from violence, access to educational and physical activity, and specialized care and support.

In the United States, the suicide rate among those detained pretrial can be 9 to 14 times higher than that in the general population.¹⁹ People detained before trial commit about three-quarters of the suicides that occur behind bars.²⁰ The suicide risk is highest during the first seven days of incarceration, when people are experiencing what corrections experts call the “shock of confinement.”²¹

F. It’s Time to Improve Washington’s Bail System

To fulfill the guarantee that every person accused of a crime is presumed innocent and to ensure fairness, our pretrial system must make good on the presumption of release for every person, regardless of their financial resources. Determining who is jailed before trial should never be based on money.

Putting this principle into practice requires us to shift away from a pretrial system that makes freedom dependent on a person’s financial means. There is a growing national movement to reduce costly pretrial detention rates and overcrowded jails, and to design new models and pretrial systems. In Washington state, reform should include the following features:

- Decrease dependence on money bail. Detention or release should not be conditioned on an individual's wealth or access to money.
- Ensure all defendants have legal representation before the initial court hearing. Bail should not be determined without competent legal counsel providing the judge with sufficient information to make a fair decision on whether to release a person.
- Create less restrictive alternatives to jailing people before trial.
- Develop pretrial programs and court appearance reminder protocols. Courts should establish pretrial programs that provide services at the beginning of a case and allow for more effective monitoring of people who are released and awaiting trial. Court appearance reminder call systems can reduce failure to appear rates and unnecessary warrants.
- Collect pretrial court data. Courts should collect pretrial data to analyze performance metrics and to track racial and other disparities.

“As we speak, close to three quarters of a million people reside in America’s jail system . . . Across the country, nearly two thirds of all inmates who crowd our county jails— at an annual cost of roughly nine billion taxpayer dollars — are defendants awaiting trial. . . . Many of these individuals are nonviolent, non-felony offenders, charged with crimes ranging from petty theft to public drug use. And a disproportionate number of them are poor. They are forced to remain in custody . . . because they simply cannot afford to post the bail required.”

*Former U.S. Attorney General Eric Holder
at the National Symposium on Pretrial Justice, 2011*

“. . . Through most of the United States today the bail system is a cruel and illogical institution which perpetuates injustice in the name of the law. In actual practice, control is frequently in the hands of bondsmen rather than the courts. The system is subject to widespread abuse. It involves the wholesale restriction of freedom, impairment of the defendant's chances at trial and millions in needless detention costs at all levels of government. . . . I am hopeful that with your leadership, and that of others like you throughout the nation we can move ahead without delay. Until we have improved the administration of justice, until our laws bear evenly on all, rich and poor alike, we cannot be satisfied that we have achieved the American dream.”

*Address by Attorney General Robert F. Kennedy
to the Academy of Trial Lawyers of
Allegheny County, June 1, 1964*

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- ⁵ Minton, Id.
- ⁶ Washington State CrR 3.2 and CrRLJ 3.2, available at http://www.courts.wa.gov/court_rules/.
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²¹ Id.; See also Martin Kaste, “The Shock of Confinement: The Grim Reality of Suicide in Jail,” *NPR*, July 27, 2015, available at <http://www.npr.org/2015/07/27/426742309/the-shock-of-confinement-the-grim-reality-of-suicide-in-jail>.