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Guilty Until the Check Clears: How Money Bail Incentivizes Wealth and Criminalizes Poverty

Caroline Jarcho

In the United States criminal justice system, a defendant is presumed innocent until proven guilty beyond a reasonable doubt, a foundational principle reinforced by protections and ideals built into the U.S. Constitution. Despite this, more than two-thirds of currently incarcerated people are merely charged with a crime but have not been convicted.¹ The number of pretrial detainees has only grown over time, increasing by over 400 percent since 1970.² For many, pretrial release is dependent upon a bail bond set by a court that can be a significant financial barrier for those who cannot afford it.³ According to the Prison Policy Initiative, over 60 percent of people who cannot afford to post bail are within the poorest third of the country's population and 80 percent are within the poorest half.⁴ Allowing states' criminal justice systems to continue to use money bail as a condition for release is inequitable. It enforces a wealth-based system where those that have more disposable income, and can therefore afford to post bail, are able to go about their lives with fewer restrictions pretrial while the most vulnerable are unfairly punished for their economic circumstances and kept behind bars before they are even found to be guilty of any alleged crime.

All pretrial conditions for release, including money bail, are imposed by a court to promote public safety and ensure that the defendant returns for their court appearances.⁵ These are supposed to be the most important factors which a bond court may consider in determining whether to grant a person bail. In reality, however, money bail does not always accomplish those goals, and financial capacity becomes a de facto third factor that determines whether a person is released on bond or not. In Illinois, for example, as judges have

¹ Chris Farrell, Lindsay Guentzel & Ariana Rosas, *Cash bail and its effect on criminal justice in the United States*, MPR NEWS (May 3, 2021), <https://www.mprnews.org/episode/2021/04/30/cash-bail-and-its-effect-on-criminal-justice-in-the-united-states>.

² U.S. COMM'N ON CIV. RTS., THE CIV. RTS. IMPLICATIONS OF CASH BAIL, ii (Jan. 20, 2022), <https://www.usccr.gov/files/2022-01/USCCR-Bail-Reform-Report-01-20-22.pdf> [hereinafter "U.S. COMM'N ON CIV. RTS., THE CIV. RTS."].

³ Bernadette Rabuy and Daniel Kopf, *Detaining the Poor: How money bail perpetuates an endless cycle of poverty and jaim time*, PRISON POL'Y INITIATIVE, 13 (May 10, 2016) <https://www.prisonpolicy.org/reports/incomejails.html>. [hereinafter "*Detaining the Poor*"].

⁴ *Id.*

⁵ 725 ILL. COMP. STAT. § 5/110-2 (eff. Aug. 2021).

reduced their use of money bail in favor of other nonfinancial conditions for release, the overwhelming majority of defendants have not committed any new violent offenses while awaiting trial and the number of court appearances post-arrest have increased as well.⁶ The data supports abolishing money bail; it is not needed to achieve those policy goals.

HOW MONEY BAIL DISPROPORTIONATELY AFFECTS LOW-INCOME POPULATIONS AND PEOPLE OF COLOR

Money bail most negatively affects low-income people and people of color. Systemic racism leads to the disparate treatment of people of color in every aspect of the criminal justice system. In Cook County, for example, Black people are incarcerated at a rate 50 percent higher than their share of the total population, while white people are incarcerated 33 percent less than their share of the total population.⁷ These systemic inequities also inevitably influence the objectives of pretrial conditional release—people of color are more likely to be considered a threat to public safety and are therefore denied bail or have higher bond amounts set in their cases.⁸ People of color are also less likely to be released with nonfinancial conditions or on recognizance when compared to white people⁹. Studies have shown that for a white defendant and a Black defendant with similar charges and criminal history, the white defendant will have a lower bail amount imposed than will the Black defendant.¹⁰ Judges have broad discretion in a bond hearing, and this means they rely on racialized assumptions to reach a pretrial release decision.¹¹

Money bail also disfavors people who have less income or financial flexibility. A 2015 study found that incarcerated people of all demographics had a

⁶ See Office of the Chief Justice, *Bail Reform in Cook County: An Examination of General Order 18.8A and Bail in Felony Cases*, Circuit Court of Cook County, State of Illinois 32, 36 (May 2019). <http://www.cookcountycourt.org/Portals/0/Statistics/Bail%20Reform/Bail%20Reform%20Report%20FINAL%20-%20Published%2005.9.19.pdf>.

⁷ *Incarceration Trends: Cook County, IL*, VERA INST. OF JUST. (Dec. 16, 2021), https://trends.vera.org/state/IL/county/cook_county.

⁸ See Katherine Hood and Daniel Schneider, *Bail and Pretrial Detention: Contours and Causes of Temporal and County Variation*, 5 RSF: RUSSELL SAGE FOUND. J. OF THE SOC. SCI. 1, (Feb. 2019); Wendy Sawyer, “How race impacts who is detained pretrial,” PRISON POLY INITIATIVE (Oct. 9, 2019), https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/; Stephan Demuth and Darrell Steffensmeier, *The Impact of Gender and Race-Ethnicity in the Pretrial Release Process*, 51 SOC. PROBS. 2, (May 2004).

⁹ U.S. COMM’N ON CIV. RTS, *supra* note 2 at 38.

¹⁰ *Id.*

¹¹ *Id.* at 39.

median annual income that was 41 percent lower than their nonincarcerated demographic counterparts.¹² When people who are detained pretrial do not have much money saved for emergency circumstances, it does not make a difference whether the bail is set for \$50 or for \$50,000; they will be unable to pay for their release and will remain incarcerated awaiting the resolution of their case.¹³ A typical bail bond of \$10,000 is equivalent to eight months' worth of income for a low-income detainee.¹⁴ In addition to the bail amount itself, jails and prisons in 41 states employ "pay-to-stay" programs where detainees are charged room and board for each day they remain incarcerated.¹⁵ Coupled with other costs, such as phone or video calls to loved ones and legal representation, low-income detainees with no ability to pay for all of the costs associated with pretrial detention are the most disproportionately affected by money bail rulings.

Pretrial detention can exacerbate a defendant's lack of income. Defendants released on recognizance or with nonfinancial release conditions can continue to work to support their families and save for the impending costs associated with their case. Pretrial detention cuts defendants off from the ability to make money to support their family as well as jeopardizes their current employment. In essence, money bail criminalizes poverty.

THE ILLINOIS PRETRIAL FAIRNESS ACT

In January 2021, the Illinois legislature passed the Pretrial Fairness Act (hereinafter "The Act") as a part of the larger SAFE-T Act.¹⁶ The Act, the first of its kind in the U.S., will eliminate money bail in the state by the beginning of 2023.¹⁷ The Act changes the criteria under which judges can make a pretrial release determination, pivoting from a "generalized danger to another person or the community standard" to a standard where there must be a "specific, real, and present threat to a person, or [have] a high likelihood of willful

¹² Bernadette Rabuy and Daniel Kopf, *Prisons of Poverty: Uncovering the pre-incarceration incomes of the imprisoned*, PRISON POLY INITIATIVE (July 9, 2015) <https://www.prisonpolicy.org/reports/income.html>.

¹³ Shirin Ali, *Survey finds more than half of Americans can't afford a \$1,000 emergency*, THE HILL (Jan. 19, 2022) <https://thehill.com/changing-america/respect/poverty/590453-survey-finds-over-half-of-americans-cant-afford-a-1000>.

¹⁴ *Supra* note 3 at 2.

¹⁵ *Id.* at 6.

¹⁶ *The Pretrial Fairness Act*, COAL. TO END MONEY BOND <https://endmoneybond.org/pretrialfairness/> [hereinafter "*Pretrial Fairness*"].

¹⁷ *Id.*

flight.”¹⁸ These changes are expected to reduce the influence of implicit racial bias in bond decisions.¹⁹ The Act also includes other important changes to the bond system in Illinois, including reducing the types of charges for which someone may be detained pretrial, reducing penalties for violations of any pretrial release conditions, and increasing transparency in the data collection surrounding bond cases.²⁰

With the elimination of money bail comes the inevitable expansion of other nonfinancial conditions for release.²¹ These conditions for release can include provisions such as electronic monitoring, curfews, and drug testing.²² In addition to preventing against recidivism and ensuring that defendants return to court for subsequent appearances, nonfinancial conditions are allegedly imposed on defendants to provide support.²³ However, this is not always the case as nonfinancial conditions often become punitive and result in a defendant becoming incarcerated for violating those conditions.²⁴ When a defendant violates their pretrial conditions, they may not be doing so willfully or intentionally.²⁵ People miss court for many reasons that are outside of their control, such as risking unemployment or lacking transportation to and from their court appearances.²⁶ Most people, if given a new court date, and reminders or access to resources like transportation assistance or childcare, come back to court; very few people willfully flee court.²⁷ However if they do fail to comply with their release conditions, the conditions themselves become the basis for a violation as opposed to something that supports people.²⁸ The Act aims to tackle issues associated with nonfinancial conditions.²⁹ For example, the Administrative Office of the Illinois Courts, in support of the Act, is creating a new statewide system for pretrial services in the 66 counties where services do not currently exist.³⁰ Hopefully nonfinancial pretrial conditions

¹⁸ U.S. COMM’N ON CIV. RTS, *supra* note 2 at 130; 725 ILL. COMP. STAT. § 5/110-1.

¹⁹ *Id.* at 130.

²⁰ *Supra* note 15.

²¹ Zoom Interview with Sharlyn Grace, Senior Pol’y Advisor, L. Off. of the Cook Cnty. Pub. Def. (Mar. 15, 2022). [hereinafter Grace interview].

²² U.S. COMM’N ON CIV. RTS, *supra* note 2 at 166.

²³ *Id.*

²⁴ Grace interview, *supra* note 20.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*; Office of Statewide Pretrial Services, ADMIN. OFF. OF THE ILL. CT. <https://www.illinoiscourts.gov/statewide-pretrial-system>.

become less punitive and more supportive, because as advocates of the Act emphasize, people should not need supervision from the court in order to be successful.³¹

Although the law has not yet taken effect, the Act already has many vocal opponents. State Republicans are calling for repeal of the Act and using it “as a political football” ahead of this year’s state elections.³² Law enforcement and prosecutors are against the Act as well, citing concerns that it will reduce public safety.³³ “There is so much misinformation blaming the Pretrial Fairness Act for things that are happening under the status quo. There is a lot of resistance to making changes,” says Sharlyn Grace, former executive director of the Chicago Community Bond Fund and current senior policy advisor with the Cook County Public Defender.³⁴ Grace explains that there are opponents who, when there are increases in certain kinds of violent crime under the current system, think that “reform” must not be working and therefore the only alternative is to continue to use the existing system.³⁵ “But what we were doing before has never created safety,” Grace says.³⁶

Some opponents also believe that the Act will, in practice, eliminate the opportunity for defendants to bond out in the future and instead will result in more people being preventatively detained pretrial.³⁷ Advocates for the Act recognize this concern and credit the many provisions within the Act that will ensure release for the majority of people and protect against the impulse that judges may have to make conservative decisions and increase pretrial detentions.³⁸ For example, the Act requires both that police issue citations in lieu of arrest for petty offenses and ordinance violations, and that people arrested for most misdemeanors be released directly from police custody four to eight hours after arrest as opposed to the up to 48 hours that is customary prior to a

³¹ Grace interview, *supra* note 20.

³² Craig Wall, *Republican lawmakers seek to repeal criminal justice bill, claiming it makes ‘crime even worse’*, ABC7 NEWS (Jan. 20, 2022), <https://abc7chicago.com/safe-t-act-illinois-criminal-justice-bill-repeal-jb-pritzker/11492689/>.

³³ Jim Stahly Jr., *Advocates prepare to defend elimination of cash bail before it even arrives*, WGLT NPR FROM ILL. STATE UNIV. (Feb. 19, 2022), <https://www.wglr.org/local-news/2022-02-19/advocates-prepare-to-defend-elimination-of-cash-bail-before-it-even-arrives>.

³⁴ Grace interview, *supra* note 20.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

formal bail hearing.³⁹ Defendants will now spend less time in contact with the carceral system and their constitutional rights will be better protected.⁴⁰

The theory behind these new provisions is that, in cases where a bail hearing is still necessary, judges will now have significantly less ability to detain people than they do under the current system.⁴¹ This is because judges will be held accountable to the transparent and reviewable detention decisions that they make.⁴² “I think one thing that’s sometimes ignored is the absolute power that judges enjoy under the current system,” says Grace.⁴³ Currently, judges use money bonds as a way to hedge their bets and the calculus often concludes that it is safer to jail people.⁴⁴ In the event that judges are unable to jail people, then they can make defendants pay a money bond before release.⁴⁵ “The political incentives are, in many cases, stacked against the constitutional rights of clients. Judges in Illinois are largely elected and there is a lot more news coverage of someone who, as the anomaly or outlier case, is released pretrial and arrested and accused of hurting someone else while they were released.”⁴⁶ Grace expounds that those cases will get media coverage, but the cases in which someone is detained while awaiting trial and loses years of their life and then is found not guilty is not usually a news story.⁴⁷

The most well-known story of this happening is that of Kalief Browder, who was arrested at age 16 for allegedly stealing a backpack.⁴⁸ His money bail was initially set at \$3,000.⁴⁹ Because he could not afford to pay it, Browder spent three years incarcerated at Rikers Island in New York where he was subjected to physical beatings and two years of solitary confinement while awaiting trial.⁵⁰ The charges against him were eventually dismissed and his innocence was restored, but the harm caused was significant—he died by sui-

³⁹ Sharlyn Grace, *Organizers Change What’s Possible*, INQUEST (Sept. 23, 2021), <https://inquest.org/organizers-change-whats-possible/>.

⁴⁰ *Id.*

⁴¹ Grace interview, *supra* note 20.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Thea L. Sebastian and Alec Karakatsanis, *Challenging Money Bail in the Courts*, A.B.A. (Aug. 1, 2018), https://www.americanbar.org/groups/judicial/publications/judges_journal/2018/summer/challenging-money-bail-the-courts/ [hereinafter “*Challenging Money Bail*”].

⁴⁹ *Id.*

⁵⁰ *Id.*

cide a couple of years after his release.⁵¹ While this is an extreme case, it is not entirely outside of the norm. Eliminating money bail will hopefully reduce the potential for the kind of permanent damage that pretrial incarceration can cause.

Despite concerns, abolishing money bail is vital to equalizing opportunities and providing adequate due process to all defendants regardless of race or socioeconomic status. In addition to the Act's benefits for those within the carceral system and their families, reducing detention via money bail elimination saves the state money. According to the Office of the Chief Justice, it costs about \$142 a day to house a detainee in Cook County Jail.⁵² And through Cook County's efforts to reduce the number of money bail conditions imposed since 2017, residents have saved over \$31 million.⁵³ Reducing costs to defendants and taxpayers overall allows for funds to be redirected to and invested in community resources that get at the root causes of criminal activity.⁵⁴

The Act establishes important substantive and procedural safeguards, including abolishing money bail, to protect defendants' liberty while they are awaiting trial.⁵⁵ The practice in courtrooms in Illinois has strayed far from the constitutional standard of protecting innocence until guilt is proven, so the Act is a reset and recalibration to the foundational legal principles in criminal law that dictate that it is supposed to be very difficult for someone to lose their liberty at the pretrial stage of their case.⁵⁶

MONEY BAIL INITIATIVES IN OTHER STATES

Pretrial detention and money bail issues exist across the country, although states approach the problem differently. In some states, money bail has virtually not existed for years. In the District of Columbia, for example, money bail was all but eliminated with the 1992 D.C. Bail Reform Act.⁵⁷ The District chose to frame its carceral system around the presumption that if the goals of

⁵¹ *Id.*

⁵² Office of the Chief Justice, *Bail Reform in Cook County: An Examination of General Order 18.8A and Bail in Felony Cases*, CIR. CT. OF COOK CNTY, STATE OF ILL. 2 (May 2019). [hereinafter "Office of the Chief Justice"].

⁵³ *Loyola study confirms that bail reforms increase equal justice, do not increase crime*, CIR. CT. OF COOK CNTY, STATE OF ILL. (Nov. 19, 2020), <https://www.cookcountycourt.org/MEDIA/View-Press-Release/ArticleId/2796/Loyola-study-confirms-that-bail-reforms-increase-equal-justice-do-not-increase-crime>.

⁵⁴ Office of the Chief Justice, *supra* note 19.

⁵⁵ Grace interview, *supra* note 20.

⁵⁶ *Id.*

⁵⁷ U.S. COMM'N ON CIV. RTS, *supra* note 2 at 157.

detention are public safety and ensuring court appearances, they must be achieved by allowing as many defendants as possible to retain their liberty.⁵⁸ Since eliminating money bail, the District has release rates of over 90 percent.⁵⁹ Additionally, court appearance rates have remained high and rates of recidivism have dropped.⁶⁰

In other jurisdictions, advocates for money bail elimination have turned to the judicial system. In California, the state's Supreme Court ruled in 2021 that "conditioning freedom solely on whether an arrestee can afford bail is unconstitutional" under both the California and U.S. Constitutions.⁶¹ In that case, *In Re Humphrey*, the Court concluded that the state's interest should only be to ensure future court appearances and promote public safety, not to punish the defendant.⁶² The Court also emphasized the importance of the defendant's due process and equal protection rights within the money bail context.⁶³ "*Humphrey* concluded with a powerful acknowledgement that the 'assembly line' secured money bail system in California has failed, for decades, to live up to our constitutional values. It explained that, while politically difficult, it is the 'highest judicial responsibility' to ensure that constitutional rights are vigorously protected."⁶⁴ Post-*Humphrey*, some have speculated that the decision could influence other states' efforts to advance bail reforms.⁶⁵

On the federal level, the Fifth Circuit Court of Appeals in *O'Donnell v. Harris County* struck down Harris County, Texas' practice of using money bail to detain poor defendants without individualized assessment in 2018.⁶⁶ As the Chief Judge detailed in her opinion,

"the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart. The

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 163.

⁶¹ *In re Humphrey*, 482 P.3d 1008, 1012 (2021).

⁶² *Id.* at 1018.

⁶³ *Id.*

⁶⁴ *Challenging Money Bail*, *supra* note 45.

⁶⁵ Brian Howard II and Laura Muse, *In Re Humphrey: California High Court's Invocation of the Fourteenth Amendment May Influence Money Bail Systems Across the Nation*, JD SUPRA (Apr. 6, 2021), <https://www.jdsupra.com/legalnews/in-re-humphrey-california-high-court-s-9813719/>.

⁶⁶ *O'Donnell v. Harris Cty., Texas*, 882 F.3d 528, 545 (5th Cir. 2018).

district court held that this state of affairs violates the equal protection clause, and we agree.”⁶⁷

O'Donnell is a landmark case in some respects, because it was the first big case to dive into the constitutionality of the money bail system.⁶⁸ The case concerned an eight-day evidentiary hearing, involving testimony from experts, judges, and prosecutors, statistical data, over 2,000 videos of bail hearings, written exhibits, and hundreds of thousands of case records from Harris County.⁶⁹ The evidence presented “painted an overwhelming and damning portrait of our country’s senseless embrace of money-based pretrial decision making.”⁷⁰ And as a result of the decision, the pretrial detention rate in Harris County has decreased from approximately 40 percent to 5.6 percent.⁷¹

Despite these wins, a potential setback for bail reform could be on the horizon. *Daves v. Dallas County*, a Fifth Circuit en banc decision, vacated a preliminary injunction that was granted by the district court and initially upheld in part by the Court of Appeals.⁷² The case, initially brought by six indigent individuals, alleges that “indigent arrestees in Dallas County are jailed without sufficient procedural safeguards and substantive findings that would justify detention. [. . .] Based on those allegations, the Plaintiffs claim that the Defendants violated the Plaintiffs’ Fourteenth Amendment rights to procedural due process, equal protection, and substantive due process.”⁷³ The case was remanded in January 2022 so that the district court could make findings regarding abstention, indicating that the Court does not want to get involved if money bail is held to be an issue for the states to resolve.⁷⁴ *Daves* also notably sets aside the holding in *O'Donnell* as nonbinding precedent in its future abstention finding.⁷⁵ Regardless of how this particular case ends, there will always be limits to litigation. As Grace notes, “The outcome of litigation isn’t going to be to abolish money bond. It will be to create mechanisms for enforcing affordability of money bonds because the constitutionality problem comes not from the existence of money bond but from the jailing of people who can’t

⁶⁷ *Id.*

⁶⁸ *Challenging Money Bail*, *supra* note 45.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Daves v. Dallas Cty., Texas*, 22 F.4th 522, 531 (5th Cir. 2022).

⁷³ *Id.* at 529.

⁷⁴ *Id.* at 532; Bret Jaspers, *Dallas County bail bond reform lawsuit could end up before the U.S. Supreme Court*, KERA NEWS (Jan. 12, 2022), <https://www.keranews.org/news/2022-01-12/dallas-county-bail-bond-reform-lawsuit-could-end-up-before-the-u-s-supreme-court>.

⁷⁵ *Daves*, 22 F.4th at 548.

afford to pay.”⁷⁶ While making money bail more affordable through reform is certainly an improvement, money bail abolition is really the most effective and comprehensive way to ensure both that detainees’ constitutional rights are protected and that members of vulnerable communities do not continue to be the most negatively impacted by the bond system.

CONCLUSION

Pretrial detention directly contradicts the foundational constitutional principles that ensure individual liberty unless and until guilt is established. Detaining defendants based on their ability to pay is an even more egregious constitutional violation. Money bail disproportionately detains the most vulnerable groups in society, and it is imperative to work towards its abolition. To do this, there are many techniques available to achieve social change. Advocates can litigate, organize, legislate, educate, and shed light on shifting the narrative about who is most effected under the current system and why changing it is a benefit to every community. It is important to do those things to win lasting change. As advocates look to the future for money bail abolition and other bail reforms, “we don’t want to leave people behind that we won’t be able to come back for in the future. We don’t want to engage in carveouts that demonize people or create categories of people who aren’t worthy of the same protections we’re extending to others. We want to make sure that we’re building power in communities that have been impacted, developing leadership of formerly incarcerated people and other directly impacted people—that we are stronger for future fights.”⁷⁷ As this movement continues in Illinois and across the country, it is important to acknowledge that abolishing money bail is a significant achievement and one of many critical steps necessary to create a more equitable criminal justice system.

⁷⁶ Grace interview, *supra* note 20.

⁷⁷ *Id.*