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Honors College  
Frank Franz Hall  
+1 (256) 824-6450 (voice)  
+1 (256) 824-7339 (fax)  
honors@uah.edu


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**Lucas Baudry**

Student Name (printed)

  
\_\_\_\_\_

Student Signature

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\_\_\_\_\_

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**Program Director:**

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## Abstract

Cash bail is a topic that is subject of contentious debate among Americans. While some argue that it is a necessary component of the juridical process because of its longstanding use and supposed contribution to the prevention of flight and rearrest of pretrial defendants, others have charged it as disproportionately and adversely affecting poor defendants. This report promotes the latter assertion and explains why and how release conditions that require money up-front is counter-intuitive to the aims of the criminal justice system. This report discusses how the use of bail has changed in America through time, it explains some of the ways through which cash bail harms defendants, and it explores alternatives to cash bail that may be expected to yield more equitable outcomes for those accused of crimes. By explaining the findings of various sets of data, examining key pieces of legislation, and referring to relevant court cases, an argument in favor of the elimination of cash bail from the juridical system of the United States is presented so that its harmful effects may be better understood.

## Introduction

In 1966, President Lyndon B. Johnson proclaimed that the indignant defendant “languishes in jail weeks, months, and perhaps even years without trial ... for one reason only — because he is poor.”<sup>1</sup> When President Johnson said this, the ratio of confined prisoners to the civilian population was at a twenty year low of 102.7 prisoners per 100,000 civilians.<sup>2</sup> In 2020, fifty-four years after President Johnson’s remark, that ratio had increased dramatically to 698 prisoners per 100,000 civilians.<sup>3</sup> The alarming increase in incarceration rates can largely (but not solely) be attributed to the harsher sentencing and policing mandated by the War on Drugs, both of which contributed significantly to the rise of mass incarceration within the United States.<sup>4</sup> What I wish to convey, however, is not a speculation on the cause of mass incarceration in the United States, but rather the fact that the defendant that President Johnson described — the one who finds himself imprisoned due to his poverty rather than his guilt regarding the commission of a crime — has become concerningly multiplicitous and that the elimination of cash bail must occur so that the United States may cease its problematic practice of imprisoning people for the non-crime of being poor.

In Michelle Alexander’s *The New Jim Crow*, it is said that mass incarceration is upheld by “a tightly networked system of laws, policies, customs, and institutions that operate collectively to ensure the subordinate status of a group defined largely by race”, and if such is accepted, then there is an interest in assessing how cash bail contributes to this kind of subordination.<sup>5</sup> While certainly true that cash bail disproportionately harms people of color (as does much of the nation’s criminal justice system), this report focuses on the impact of cash bail and pretrial detention on the poor, more generally, as a subordinated population. To convey the imperative necessity of eliminating cash bail, I shall first outline how the United States’ bail

system has changed since its inception before then considering which demographics are affected by its most recent form. Following the discussion chronicling cash bail in the United States, I shall argue that cash bail is an unjust practice that is contrary to the American juridical system's aims by illustrating its unnecessarily high cost, its negative effect on those who are expected to pay it, and its adverse sentencing and conviction outcomes. Finally, I will discuss recent state and local efforts to curtail or eliminate cash bonding so that the more equitable practices that those efforts would, should they succeed, usher into the juridical system may be considered.

## What Is Bail and How Has Its Use Evolved?

Pretrial detention is intended to serve the dual function of ensuring a defendant's appearance for trial and protecting the community.<sup>6</sup> There are two methods through which a defendant may be excused from serving pretrial detention: by the posting of financial bail and the adherence to court-ordered conditions of release that require no up-front cost. Cash bail, as the name implies, belongs to the former category. Non-financial methods of release from pretrial detention, on the other hand, may take the form of release on one's own recognizance, an unsecured bond, release to pretrial services, or conditional release.

These different means of release each entail unique conditions that the accused must meet to avoid pretrial detention. Defendants often must pay a percentage (around 10%) of the bail amount that was set for them and will be made to pay the full amount if they fail to abide by the conditions set forth by the court (reappearance for future hearings or for trial and no rearrests). For instances wherein the defendant is offered conditional release, he or she may avoid pretrial detention by abiding to certain expectations given to him or her by the court, which include but are not limited to requirements to submit to drug and alcohol screenings, undergo supervision, or successfully completing substance abuse treatment. It is not unusual for courts to mandate a mix of financial and non-financial release conditions that must be met for an accused person to avoid pretrial detention.

The United States' juridical system's increasing reliance on money bail is well documented. In 1990, 37 percent of pretrial releases had a financial condition, and the most popular method by which defendants secured their freedom before trial was through release on recognizance, meaning that they had only to sign an assurance that they would appear for their court appearance.<sup>7</sup> Within nineteen years, the percentage of pretrial releases that included



financial conditions increased to 61 percent, and the use of surety bonds nearly doubled.<sup>8</sup> It is certainly worth examining the history of bail in the United States to understand its current applications.

Commercial bonding came into favor in the United States when it became a viable alternative to the inefficacy of the original pretrial release practice of remitting defendants to a personal custodian (typically a friend, neighbor, or family member).<sup>9</sup> As “the vast unsettled American frontier provided a ready sanctuary for any defendant wanting to flee”, an incentive to incorporate financial conditions to bail so that court hearings could proceed developed.<sup>10</sup> This marked a deviation from the English bonding system that the United States had inherited, which mandated that those whose offenses were deemed bailable be automatically released; judicial officers who demanded payment for release could face imprisonment.<sup>11</sup> This was evidently no longer the case by 1896 when the first commercial bonding business in the United States opened in San Francisco.<sup>12</sup> The business was successful and was soon so widely emulated that commercialized bail that allowed for profit-making on the part of bail bondsmen became an integral component of the American Justice system; in its 1912 ruling in *Leary vs. The United States*, 224 U.S. 567, Supreme Court Justice Oliver Wendell Holmes, Jr. opined that “the distinction between bail [i.e., common law bail, which forbade indemnification] and suretyship is pretty nearly forgotten. The interest to produce the body of the principal in court is impersonal and wholly pecuniary.”<sup>13</sup>

The Bail Reform Act of 1966, which was the first piece of major federal bail legislation since the ratification of the Eighth Amendment, was enacted to protect the poor from the practice of for-profit bonding, ensuring that defendants “shall not be needlessly detained” before their trial in federal court.<sup>14</sup> In some regards, this reform was successful; it created a presumption of

release that did not depend on the defendant's ability to pay, it allowed new conditions of release to be implemented when release on recognizance was not possible, and it allowed judicial officers to employ a risk assessment test to determine the appropriate kind of release condition for the accused. As a result of the Bail Reform Act of 1966, judicial officers were instructed to consider the following when determining release conditions: nature of the offense, weight of evidence, family ties, employment status, financial resources, character, length of time at current residence, criminal record, and appearance record.<sup>15</sup> Courts were, in effect, directed to impose the least restrictive release conditions that would still ensure appearance at trial and sentencing.

Although the Bail Reform Act of 1966 was helpful in these regards, its drawbacks were promptly noted, with members of the District of Columbia Bar writing in the *American Bar Association Journal* in 1966 that the reform fell short of revising the bail system in "two major respects... : it [did] not authorize courts to consider danger to the community in setting conditions of pretrial release in noncapital cases; and while it subordinate[d], it fail[ed] to eliminate money as a condition which [could] cause the detention of persons unable to raise it."<sup>16</sup> The Bail Reform Act of 1966, then, was imperfect in that those who were given cash bail bonds as the least restrictive measure possible (given the result of their risk assessment) might still be made to languish in jail not because of their guilt, but because of their poverty.<sup>17</sup> It was certainly a step in the right direction, but fell short in eradicating the problem at its source.

The Bail Reform Act of 1966 was overturned with the passage of the Bail Reform Act of 1984. Whereas prior to the enactment of the Bail Reform Act of 1984 pretrial detention was used to mitigate the risk of flight, this act allowed detention based on the defendant's perceived danger to the community. While the Bail Reform Act of 1966 created a significant presumption of release, the Bail Reform Act of 1984 articulated a variety of instances in which release was

not permitted: crimes of violence that carry a maximum sentence of ten years or more, violations against the Controlled Substance Act that carry a maximum sentence of ten years or more, repeated commission of felonies, and when there is risk of obstruction of justice.<sup>18</sup> In the eighteen years between the passage Bail Reform Act of 1966 and its replacement with the Bail Reform Act of 1984, the presumption of release was, though not eradicated, severely qualified.

Prior to the Bail Reform Act of 1984 — during the 1960's and 1970's — the failure to appear rate in America's most populous cities was at around 6 to 9 percent<sup>19</sup>; by 2006 the failure to appear rate for felony cases had increased to 22 percent.<sup>20</sup> Though the cause of this increase in failure to appear rates is not singular and can likely be attributed to a variety of factors, it is certainly not unreasonable to consider that the provisions of the Bail Reform Act of 1984 that created higher standards for release from pretrial detention contributed to the increase. As the risk of flight increased so dramatically between the 60's and 70's to 2006, an assessment on its efficacy is evidently overdue. With the advent of the era of mass incarceration, it paramount that serious conversation of reform is had, and in the next sections it shall be argued that the most meaningful and effective form of reform is the elimination of cash bail and its substitution by more equitable release options.

## The Cost and Efficacy of Bail Compared to Pretrial Services

As the issues with cash bail are multitudinous in nature, some of these issues will be discussed in this section and those that follow it.

The first issue to be considered is the financial cost of bail. Non-financial bail, as was said in the second section of this paper, may include remission of a defendant to pretrial services or release on recognizance. Pretrial service programs gather information about defendants and present it to judicial officers before recommending conditions that would be conducive to a defendant's release from pretrial detention to the judicial officers; additionally, pretrial services have the function of supervising defendants who are released from custody prior to their trial by "monitoring their compliance with release conditions and by helping to ensure they appear for scheduled court events."<sup>21</sup> Release on recognizance is simpler in the sense that it merely entails a defendant's agreeing to return for subsequent hearings for his or her trial without the need for supervision. There are numerous studies that focus on the costs associated with bail, release, and pretrial services. This report, rather than exploring each of these extensively, will examine reported costs in certain jurisdictions to establish the general trend that exists regarding the higher cost of bail than of other release options, but one must be cognizant of the variations in cost that occur between states, localities, and years.

In a study on Kentucky's pretrial risk assessment testing, it was found that people who were labelled as "low risk" and who were consequently offered release on recognizance were likely to attend their hearings and avoid being rearrested, suggesting that release on recognizance can have positive and uncostly outcomes.<sup>22</sup> Those who were assigned a higher risk assessment rating, on the other hand, were less likely to be granted release on their own recognizance and were thus more likely to be required to post a financial bond to avoid pretrial detention, but "the

irony is that those who have no financial support rate higher on the risk assessment”, meaning that Kentucky’s risk assessment tools were designed to release those who could (at least in theory) afford bail and incarcerate those who could not.<sup>23</sup>

Whereas release on recognizance is the cheapest method by which the government can avoid detaining people prior to their trial, incarcerating defendants is extremely expensive. In 2011, the cost of detaining people until their trials cost counties 9 billion dollars per year, thus making pretrial incarceration a costly burden to the general public.<sup>24</sup> In the third quarter of 2011, 71 percent of California’s jail population was being held pretrial<sup>25</sup>, and the costs associated with the incarceration of this massive bloc of prisoners totaled an estimated \$100 per day per prisoner.<sup>26</sup> Mark McDaniel, a defense attorney in Huntsville, Alabama cited the high cost of incarceration as a reason to transition to a less punitive and costly punishment for minor drug offenses: “We’re right at 40 dollars a day for each inmate [in the Madison County Jail] and you’ve got over 1,000 inmates down there right now in the local jail. Add that up per day, per month, and per year — you see how many millions of dollars you’re paying... you’re spending 25% of your general fund taxpayers’ money in the state of Alabama to keep people locked up for nonviolent offenses.”<sup>27</sup> This problem exists in many jurisdictions that utilize cash bail; in 2015, the annual cost of incarcerating a single prisoner in the five most populated states in the country (California, Texas, Florida, New York, and Illinois) was \$64,642, \$22,012, \$19,069, \$69,355, and \$33,507, respectively.<sup>28</sup> The high cost of incarceration is juxtaposed by the far more economical services provided by pretrial service agencies. Pretrial services in Florida can cost as little as \$1.48 per day per prisoner.<sup>29</sup> Pretrial services in California can cost as little as \$2.50 per prisoner per day.<sup>30</sup> It was by implementing these kinds cost-saving initiatives that tax-payers in Iowa were able to avoid \$53,300,000 in detention costs between 2008 and 2009.<sup>31</sup>

Studies on the outcomes of pretrial services have affirmed their efficacy in promoting defendants' continued appearance at hearings and preventing their recidivism or re-arrest while they wait for trial. A research project that examined pretrial services in Orange Beach, Florida that was conducted for the American Journal of Criminal Justice found that people who were supervised by a pretrial service agency had an appearance rate of 67 percent, while those who were unsupervised had an appearance rate of 54 percent.<sup>32</sup> Pretrial service agencies have a variety of means other than supervision by which they can ensure positive outcomes for defendants and save the government the money that would otherwise have to be used to continue incarceration. These means include court date reminder systems, drug testing and treatment, and electronic monitoring — all of which have yielded favorable results. In a report that provides an overview of various studies conducted on Arizona's pretrial services, it was found that the failure to appear rate for misdemeanor defendants who were called to be reminded of their court dates was 76.7% lower than those who were not called and defendants who had to submit to drug testing were less likely to be rearrested than those who were not.<sup>33</sup> Studies on electronic monitoring found that although technical violations occurred, "the use of electronic monitoring was associated with a decrease in either failure to appear or rearrest rates."<sup>34</sup> An increased reliance on cash bonds and the setting of higher bail has had the opposite effect than that of pretrial services, with the failure to appear rate increasing by around 13 percent since the 1960's to 2006 (during which time bail amounts increased).<sup>35</sup>

Though there are certainly more case studies that could be considered, it seems as though pretrial services are not only significantly less expensive to institute than incarceration, but that they tend to succeed at preventing flight and rearrest. It is thus concerning that, as of 2011, "fewer than 1,000 of the 3,000 counties in the United States benefit[ed] from services provided

by some 300 pretrial programs”<sup>36</sup> and that commercial bail remains the most common form of pretrial release.<sup>37</sup>

## Money Bail's Adverse Effects on Individual Defendants

Though the high cost of incarcerating pretrial defendants is certainly a cause for concern, a commentary on the merits (or, rather, the lack thereof) of cash bail would be incomplete without the inclusion of a discussion about the people that it subordinates. Apart from the commercial bail bondsmen who profit from it, no party is served by the cash-for-freedom practice; law enforcement must deal with overcrowding prisons<sup>38</sup>, those uninvolved with the penal system have their taxes spent to uphold an unjust system, and those who are expected to pay cash bail to secure pretrial release are disadvantaged in many steps of their proceedings.<sup>39</sup>

These disadvantages that defendants face are prolific; the financial burden of unnecessary pretrial detention is compounded by the potential for loss of employment, housing opportunities, and lenient sentences.<sup>40</sup> This list of adverse effects that are caused by incarceration prior to conviction is, of course, incomplete since the immediate impact of pretrial detention varies from defendant to defendant. One thing, however, is true for all those who are assigned money bail: unless they have the financial resources necessary to post bail, they will remain imprisoned. This is despite the fact that “the ability to pay money bail is neither an indicator of a defendant’s guilt nor an indicator of risk in release.”<sup>41</sup> The three aforementioned adverse effects will be briefly considered.

Pretrial detention poses an immediate threat to the jobs that provide what little financial security indignant defendants have. A defendant who is unable to show up for their assigned shifts at work due to incarceration — even if just for a matter of days — is liable to be terminated from his or her place of employment. Such hinderance is unlikely to be transient, as employers have legally discriminated and continue to discriminate against those with histories of criminal activity and incarceration.<sup>42</sup> A study that upheld this fact found what to many may



appear to be a truism — defendants who can afford to post bail earn “substantially more in the two years after the bail hearing compared to initially detained defendants and are more likely to be employed,” and that “37.8 percent of initially detained defendants are employed in the formal labor market compared to 48.3 percent of initially released defendants.”<sup>43</sup> These statistics make clear that defendants who are incarcerated while awaiting trial, regardless of whether they committed the crime that they have been accused of, are at least somewhat barred from the labor market upon their release.

In addition to adversely affecting opportunities of gainful employment, a defendant’s inability to escape incarceration because of poverty may have devastating outcomes on a his or her housing situation. Incarcerated people who lose their income because of their detention may become incapable of paying their rent or mortgage both during their incarceration and after their release, thus increasing the chances of their eviction or loss of home. In fact, it is estimated that 23 percent of people who are incarcerated while awaiting trial lose their rental housing.<sup>44</sup> Chronic homelessness, which occurs when individuals undergo extensive and repeated periods of homelessness, is “is perpetuated by a legal system that criminalizes survival behaviors associated with homelessness”<sup>45</sup>, which is evidenced by the fact that homeless people are 11 times more likely to be arrested than housed people for transgressions such as loitering, sleeping in public places, and soliciting donations.<sup>46</sup> Pretrial detention can be devastating to the well-being of those it affects, and any system that requires money to avoid such detention is bound to result in disparate outcomes among the well-off and the indigent.

What is possibly the most alarming of these disparate outcomes is the higher conviction and sentencing rates of defendants who are initially detained when compared to those who are released. An analysis of the 153,407 defendants in Kentucky who were booked between July

2009 and June 2010 found that defendants who had been assigned a low-risk rating and who had been incarcerated for the entirety of the pretrial process were 5.41 times more likely to be sentenced to jail and 3.76 times more likely to be sentenced to prison than were other low-risk defendants who had been released during the pretrial process; those who were assigned a medium or high ranking and who had been incarcerated for the entirety of the pretrial process were 3 times more likely to be incarcerated than medium and high risk defendants who had been released.<sup>47</sup> The same analysis found that defendants who were incarcerated during their pretrial process and who were convicted received jail sentences that were 2.78 times longer than those who were released. Those who can afford the financial condition of release imposed upon them can thus be said to have an advantage in the judicial process based on nothing other than their finances.

There are a variety of reasons that could potentially account for these disparate outcomes. One such reason is that defendants who are incarcerated during their trial may be more inclined to accept a plea deal offered by prosecutors. A staggering majority of convictions in the United States occur not because a unanimous jury determined a suspect's guilt beyond a reasonable doubt, but because the defendant accepted a plea deal through which he or she either could be safeguarded from continued time in jail or to begin his or her custodial sentence sooner than they would otherwise.<sup>48</sup> Because "the material, psychological, and temporal pains of pretrial detention lead many detainees to plead guilty to escape jail," people who are too poor to post bail are, in effect, coerced into accepting plea bargains; this is not true for those for whom release is a viable option.<sup>49</sup>

## Moving Forward

Some states, having recognized the unequitable manner by which money bail allows for the penal system to be weaponized against the poor have undergone significant efforts to overhaul their bail systems. Below are some of these efforts.

As a result of *In re Humphrey*, 482 P.3d 1008 (Cal. 2021), the California Supreme Court eliminated cash bail for those who cannot afford it, deeming that it is was unconstitutional to impose money bail without consideration about whether the defendant could afford it or not.<sup>51</sup> In this particular case, a sixty-three-year-old senior home resident named Kenneth Humphrey was accused of having entered his neighbor's dwelling, threatened him, demanded money, and stole a \$7 bottle of cologne.<sup>50</sup> His \$600,000 bail was reduced to \$350,000, but the California Supreme Court upheld a lower court's ruling that even the lower amount was punitive and violated the Due Process and Equal Protection clauses of the Fourteenth Amendment, which the Court interpreted as necessitating consideration on "whether the defendant has the financial ability to pay the amount of bail ordered and, if not, whether less restrictive conditions of bail are adequate to serve the government's interests."

Although this is an improvement from criminalizing and incarcerating poverty, it does not eliminate cash bail all together. People can still be made to pay extremely high costs to avoid incarceration when the state deems them to have the financial means to do so. This is still problematic because, as was demonstrated in the previous section, there are negative impacts on sentencing when a defendant doesn't pay bail. This, just like the less mitigated use of money bail that the California Supreme Court deemed unconstitutional, still creates a justice system for the poor that is different and separate from the rich.

Illinois, on the other hand, eliminated cash bail altogether through the Illinois Pre-Trial Fairness Act, which is a component of Illinois House Bill 3653, signed into law by Governor J.B. Pritzker in February 2021.<sup>52</sup> While this law will not take effect until 2023, it is a step in the right direction and will serve to create a more equitable release system that does not discriminate against the poor. Other states such as Kentucky, which outlawed commercial, for-profit bail in 1976, have also made efforts to remedy the issue of cash bail.<sup>53</sup>

The challenges associated with eliminating cash bail can be better understood by examining the efforts being undertaken in places where the practice of using cash bail to secure pretrial release is still in place. Tahirih Osborne, a co-founder and the current president of the Huntsville Bail Fund (a 501.3.c charitable organization that pays and reimburses bail for poor defendants in Huntsville, Alabama) launched the project as a response to the approximately two dozen arrests that occurred during a 2020 Black Lives Matter protest in her community. “Aside from Huntsville Bail Fund,” she says when discussing the state-wide collaboration for bail reform, “there’s also Tuscaloosa Bail-Out, Montgomery Bail-Out, Race Against Injustice Now, and then Faith in Works is operating a bail fund out of Birmingham. We actually meet every couple of weeks. We’ve been providing a lot of the ... practical support of *[starting bail funds]*. [That looks like] information sharing, resource sharing, but also providing the emotional support. This work can be really tough sometimes.”<sup>54</sup> Having assisted in securing the release of dozens of people in her community, she understands the impact that pretrial detention has on the indignant; she asserts that “this whole system is so destructive that it can really put somebody on the brink of homelessness. Even looking at things like unemployment and child custody — even for very short arrests — if you’re gone for three days [due to incarceration] and nobody knows where you

are, it can really change a person's whole lifestyle."<sup>55</sup> Osborne maintains that it is not just cash-bail that contributes to these devastating outcomes, but incarceration, more generally.

A component Huntsville Bail Fund's continued advocacy includes conducting research for the Pan-Alabama Bail Fund Union through a grant from the Vera Institute of Justice. An obstacle that the group must overcome for this endeavor, however, is the unavailability of data from local jails and prisons; "here in Alabama," Osborne notes, "there's a lot of latitude for the state to decide whether they're going to give over the information or not. I've approached the City Finance Director to get information on how much the municipal court is getting in court fees, both taxes and fees for court costs, and where that money is distributed, but they won't hand over that information."<sup>56</sup> The unavailability of raw data relevant to pretrial incarceration and the cash bail system it is upheld by serves a barrier towards progress in these areas.

## Conclusion

Cash bail, despite reforms on both state and federal levels, proves to be problematic due to the nature of requiring something that has no bearing on recidivism or flight risk — cash and financial resources — to secure release. It is a practice that systematically discriminates against the poor and it has been found that those who are unable to afford it are disadvantaged by the criminal justice system by being convicted at higher rates and sentenced more harshly than those who can afford it. Pretrial service agencies, on the other hand, have had promising impacts for indigent defendants that cost significantly less for both the state and defendants while still assuring similar (and often better) mitigations of flight and re-arrest. It is for these reasons that it is imperative that the United States eliminates cash the practice of cash bail and, instead, adopts a more robust presumption of release by incorporating non-financial conditions by which release may be secured.

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