

Cash Bail: An Analysis of Policies and How to Cure Mass Incarceration

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INTRODUCTION

Devoreaux Wolf was riding home from school in 2016 with his friends.¹ After being pulled over for not wearing a seatbelt, the police removed Wolf from the car.² They wrestled him to the ground, and he was arrested and charged with three counts of aggravated battery and an additional two counts of resisting arrest.³ Wolf then spent the next three and a half months in the Cook County Jail.⁴ He wasn't convicted of any crime.⁵ He wasn't deemed to be a risk to the public.⁶ Instead, Wolf was held because he could not put up the 10% of his \$30,000 bail required to be released from pretrial detention.⁷

Wolf's story is not unique. Cook County, Illinois, where Wolf was detained, saw that about 48% of its pretrial detainees remained in jail because they were unable to post their bail.⁸ For Wolf, the system failed him at every turn. In Cook County, judges are supposed to set bail only after they ask the defendant if they can afford it.⁹ In Wolf's case, the judge never asked what kind of amount he could afford, and there is no oversight to ensure that happens.¹⁰ Even further, criminal defendants that are kept in pretrial detention are nine times more likely to plead guilty to get out of incarceration.¹¹ Wolf took his own plea deal, agreeing to plead guilty to one count of aggravated battery of an officer in exchange for time served and probation.¹²

¹ see Darcel Rockett, *Poor people often can't afford to pay bail — even when they're innocent. An app developed in Chicago offers help using your spare change.*, Chicago Tribune (March 7, 2019), <https://www.chicagotribune.com/lifestyles/ct-life-appolition-making-bail-20190124-story.html>

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ see Rockett, *supra*.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

The criminal justice system put Wolf in an untenable situation, where his options were maintaining his innocence and stay in or plead guilty and get out. This situation is not uncommon, as thousands of people sit in prisons and jails nationwide without ever being convicted of a crime. Across the country, cities and states have started to rethink this approach, with some modifying the rules surrounding cash bail, and others, like Illinois, ending the practice all together. The different approaches to cash bail has provided an opportunity to study the various approaches of jurisdictions that have rethought cash bail and analyze the best practices to make the criminal justice system more just. One principal, however, seems evident: anything less than abolition leaves the opportunity of cash bail to fuel mass incarceration, and allow it to specifically be weaponized against poor people and people of color.

THE STATE OF CASH BAIL

Cash bail is a judicial procedure in which a criminal defendant pays a certain amount of money in exchange for their release from jail pending trial.¹³ Once a criminal defendant makes all their necessary appearances, the money is returned to them.¹⁴ The system was designed to function as collateral for criminal defendants to appear for their trial, as the money is forfeited if the criminal defendant does not appear.¹⁵ The money that a criminal defendant owes is usually determined by statute, and judges usually have wide discretion in deciding what the amount a criminal defendant must pay is.¹⁶

Cash bail, however, has perpetuated a system of discrimination and mass incarceration. Between 1970 and 2015, the use of pretrial detention has gone up by 433%.¹⁷ Currently, in jails

¹³ see Adureh Onyekwere, *How Cash Bail Works*, Brennan Center for Justice (February 24, 2021), <https://www.brennancenter.org/our-work/research-reports/how-cash-bail-works>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ see Lea Hunter, *What You Need to Know about Cash Bail*, Center for American Progress (March 16, 2020), <https://www.americanprogress.org/issues/criminal-justice/reports/2020/03/16/481543/ending-cash-bail>.

across the United States, three out of five people have not been convicted of a crime.¹⁸ The end result is that there are 536,000 people sitting in jail, even though they are still legally innocent of the crime in which they were charged.¹⁹ The cost of keeping pretrial detainees locked up is about \$14 billion per year, or about \$38 million per day.²⁰

In addition to fueling mass incarceration, cash bail has also targeted the poor and people of color the most. To illustrate this point, Maryland has provided an example of how cash bail can be weaponized against people of color.²¹ In Maryland, a study found that for defendants who were kept in jail for failing to pay their cash bail, over 15,000 people had a bail less than \$5,000, and over 20,000 people had a bail between \$5,001 and \$50,000.²² Compare this to the under 10,000 people who were in jail for failing to pay a bail over \$50,000.²³

Maryland also had a pattern for assessing black defendants a higher bail than non-black defendants.²⁴ Over the same period in 2011-2015, black defendants averaged a mean bail of \$48,895, whereas white defendants averaged \$33,678, a difference of 45%.²⁵ After bail review hearings, the difference becomes 51%.²⁶ Black defendants in Maryland were assessed over \$180,000,000 in bail over the study period, compared to under \$80,000,000 for white defendants.²⁷ While black defendants only account for 30% of the population in Maryland, they were assessed 69% of all bail.²⁸

¹⁸ see Onyekwere, *supra*.

¹⁹ see Onyekwere, *supra*.

²⁰ see *Why are People in Jail Before Trial?*, Pretrial Justice Institute, <https://www.pretrial.org/get-involved/learn-more/why-we-need-pretrial-reform> (last visited on April 18, 2021).

²¹ see Onyekwere, *supra*.

²² see Arpit Gupta et. al., *The High Cost of Bail: How Maryland's Reliance on Money Bail Jails the Poor and Costs the Community Millions*, Maryland Office of the Public Defender (November 2016), http://docs.wixstatic.com/ugd/868471_23811682395a4fedacc40dda7fa71124.pdf.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

Maryland isn't alone in having a bail system that discriminates against non-white defendants. In local jails across the country, 70% of incarcerated persons are there in pretrial detention, and 34% of those are there because they were unable to afford cash bail.²⁹ Those who can't afford to pay cash bail are left with two options: commercial bail bonds or waiting in jail awaiting trial.

The first, commercial bail bondsmen, are private companies that agree to post bail for a defendant, and in return they charge a fee that is generally about ten to fifteen percent of the bail amount.³⁰ In addition, the bail bondsmen collect collateral, usually personal or real property of value, to secure the rest of the bail, and if the defendant fails to appear, the bondsman keeps the collateral to recoup the value of the bond.³¹ Of course, this system does not work for people who do not have enough assets to pay the fee or put up the collateral. In addition, since black defendants are routinely assessed higher bail, they are more likely to be unable to afford a commercial bondsman.

When defendants cannot afford their bail, and cannot find a bondsman, they have few options, forcing them to the only available option left. For those unable to scrape together bail, they will wait until their trial in jail. Sitting in jail awaiting trial has negative outcomes not only on the defendant's case, but on outcomes outside of the criminal justice system.³² Defendants who await their trial in jail are four times more likely to be convicted than those who are released pre-trial.³³ Further, they are more likely to plead guilty to the original or new, lesser charges in an

²⁹ Wendy Sawyer and Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, Prison Policy Initiative (March 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html>

³⁰ see Onyekwere, *supra*.

³¹ *Id.*

³² *Id.*

³³ *Id.*

effort to get out of jail, instead of taking the chance of facing a trial and getting a lengthier sentence.³⁴

In addition to the legal outcomes to their case, sitting in jail can have devastating outcomes to a defendant's life, even if they are later found innocent, or even if no charges are filed. For some criminal defendants, their jobs require them to show up, and they'll get fired if they don't. For others, they may be single parents who will lose their kids to the protective services if they cannot find care for them while they sit in jail.³⁵ Others may be living in shelters, where if they don't show up they lose their spot and are now homeless.

The case of Bernie Baker is a good example of this point. 40 years ago, Baker was arrested for marijuana possession.³⁶ He was meant to start a job that same week, but after spending a week at the local jail, that job offer was no longer there for him to take.³⁷ Since then, he's been arrested a handful of times, and has struggled to get hired in a permanent job.³⁸ He has attempted to make some money scrapping metal but notes that if he doesn't work for a couple of days, he may end up insolvent.³⁹ As a result, he'd be unable to make bail, have to stay in jail, and repeat the cycle of poverty that perpetuates pre-trial mass incarceration.

However, jurisdictions across the country have started to adopt new policies that amend the process for cash bail or abolish entirely. Some, like Illinois, have completely abolished the practice. Others, like Philadelphia and New York, have modified the way that bail is assessed. These jurisdictions have been met with mixed results.

³⁴ see Onyekwere, *supra*.

³⁵ see Courtney Collins, *People in Jail Before Trial Risk Losing Jobs, Kids. This SMU Student Wants to Bail Them Out*, KEWA News (March 13, 2018), <https://www.keraneews.org/2018-03-13/people-in-jail-before-trial-risk-losing-jobs-kids-this-smu-student-wants-to-bail-them-out>.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

REFORMING THE CASH BAIL SYSTEM

Policymakers across the country have started to reform the cash bail system, recognizing both the structural and systemic inequality that comes with it. A look into the policies that have emerged may provide some guidance into what is working, what isn't, and what policies may be best to adopt.

Illinois

One of the boldest policy proposals has been in Illinois, when they completely abolished the assessment of cash bail in all jurisdictions across the state.⁴⁰ The Illinois Pre-Trial Act, part of the larger criminal justice reform House Bill 3653, modified the way defendants are processed through the system before trial.⁴¹ The elimination of cash bail will not become effective until January of 2023.⁴² The delay in enacting the legislation is meant to allow the Illinois Attorney General to work on any complications that may come from a fundamental change to the criminal justice system.⁴³

The policy itself prevents any judge from setting any kind of bail for a defendant charged with a crime.⁴⁴ The new system will, instead, institute a hearing before a judge wherein evidence will be presented to see whether the defendant poses a threat to the community.⁴⁵ If they are deemed to not be a risk, they are released awaiting trial. If they are deemed to be a risk, then they are held in detention until trial.⁴⁶

⁴⁰ see Maria Cramer, *Illinois Becomes First State to Eliminate Cash Bail*, The New York Times (February 23, 2021), <https://www.nytimes.com/2021/02/23/us/illinois-cash-bail-pritzker.html>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

Proponents of the legislation argue that cash bail was part of the systemic racism that plagues the criminal justice system.⁴⁷ Following the racial justice protests last summer, legislators found it necessary to try and pass this policy for a sixth time.⁴⁸ It was past time, legislators argued, to have a reckoning on racism, and to change the way that business is done in the State of Illinois.⁴⁹

Meanwhile, opponents of the bill say that the ending of cash bail will make the police and communities less safe.⁵⁰ Specifically, they believe that for drug users and people with mental health conditions, prisons and jails allow them to be housed in centers where they can get the help they need.⁵¹ Instead, they argue that ending cash bail was throwing away a whole system that only needed amendments.⁵² They further cite to jurisdictions like New York, where there has been an uptick in crime over the past year.⁵³

These arguments, however, are misleading. First, the bill allows for drug users and people with mental health conditions to be steered into treatment programs instead of landing in jail.⁵⁴ Spending time in jail does not improve mental health outcomes, nor does it end drug use. Even further, spending even a few days in jail leads to bad outcomes both in the criminal case, and to a defendant's housing, family, and employment issues.⁵⁵ In addition, crime has seen an increase across the country, and not only in jurisdictions that have amended their bail procedures.⁵⁶

It is still too early to make conclusions on how the bill affected the mass incarceration problem in Illinois, especially since the ending of cash bail is not effective yet. However, a bold

⁴⁷ see Cramer, *supra*.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ see Collins, *supra*.

⁵⁶ see Cramer, *supra*.

public policy initiative like this recognizes that the cash bail system is discriminatory and in need of reform. While opponents have expressed concerns, proponents are confident that this is the first step toward fixing the criminal justice system and end mass incarceration.

New Jersey

While not all jurisdictions have been able to end cash bail entirely, many have modified their approach to limit its use. One of those jurisdictions, New Jersey, effectively ended mandatory cash bail, without statutorily abolishing the practice, in 2017.

The New Jersey approach, called the Criminal Justice Reform or CJR, shifted away from cash bail and toward a system that focused on risk.⁵⁷ The CJR “consisted of the following main components: (1) a substantial reduction in the use of money bail; (2) the use of the Public Safety Assessment, or PSA, to assess defendants’ risks and the Decision Making Framework, or DMF, to inform the release conditions needed to manage those risks; (3) the legal ability to detain defendants without bail until their cases are disposed of (pretrial detention); (4) the creation of a pretrial monitoring program in which defendants check in with court staff members at regular intervals; and (5) speedy-trial laws that limit the time prosecutors have to reach major milestones such as indictment and case disposition for defendants in jail, and on the time courts have to schedule a first appearance hearing and make a release decision following an initial jail booking.”⁵⁸ These components come together to try and balance the interests of not keeping people in jail with the concern to public safety and ensuring the appearances of defendants.⁵⁹

⁵⁷ see Chloe Anderson et. al., *Evaluation of Pretrial Justice System Reforms That Use the Public Safety Assessment*, MDRC Center for Criminal Justice Research (November 2019), https://www.mdrc.org/sites/default/files/PSA_New_Jersey_Report_%231.pdf.

⁵⁸ see Anderson, et. al., *supra*.

⁵⁹ see Anderson, et. al., *supra*.

Under the CJR, the risk assessment takes place in two different places. First, when police are arresting someone, they have to decide if they will issue a “complaint-warrant,” in which case they will book the defendant into jail, or a “complaint-summons,” in which the officer releases the defendant with a court date.⁶⁰ The second time is at the first court appearance, in which a judge decides the terms of release for defendants who were issued a complaint-warrant.⁶¹

While the CJR did not eliminate the use of cash bail, it has become used very rarely.⁶² Instead, judges instead can decide to hold defendants in jail when there is a high-risk of new criminal charges or failure to appear.⁶³ The CJR also created a pretrial monitoring program, which works to ensure that criminal defendants make their court dates.⁶⁴ The CJR also created a speedy-trial clause, which requires that certain crimes come to trial within a statutory time period.⁶⁵

As a result of the CJR, the number of arrests in New Jersey fell, beating even the expected outcomes of the CJR.⁶⁶ In July 2017, the total number of arrests beat expectations by twelve percent, with only 15,264 arrests in all of New Jersey for the month.⁶⁷ Further, the length of jail stays fell. The amount of jail stays over three days beat expectations by sixteen percent.⁶⁸ It was even greater for stays of over ten and thirty days, beating expectations by over thirty percent each.⁶⁹

The CJR also changed the way police interacted with the public. Complaint-warrants were only issued forty-three percent of the time, and complaint-summons were issued fifty-six percent of the time.⁷⁰ The practical result is that the police were detaining fewer people in jail, and more

⁶⁰ see Anderson, et. al., *supra*.

⁶¹ see Anderson, et. al., *supra*.

⁶² see Anderson, et. al., *supra*.

⁶³ see Anderson, et. al., *supra*.

⁶⁴ see Anderson, et. al., *supra*.

⁶⁵ see Anderson, et. al., *supra*.

⁶⁶ see Anderson, et. al., *supra*.

⁶⁷ see Anderson, et. al., *supra*.

⁶⁸ see Anderson, et. al., *supra*.

⁶⁹ see Anderson, et. al., *supra*.

⁷⁰ see Anderson, et. al., *supra*.

people are released before their criminal appearance.⁷¹ For those that were detained, at their first hearing, eighty-two percent of defendants were released.⁷² Judges played a big role in the success of the program, with judges going with the recommendation of the DMF over sixty-three percent of the time, and only implementing a more restrictive release condition twenty-four percent of the time.⁷³

While the CJR did reduce the number of arrests and pre-trial detentions in New Jersey, the statistics show that it did not eliminate the racial disparities in the criminal justice system.⁷⁴ For those criminal defendants that were issued complaint-warrants, forty-seven percent of people were black.⁷⁵ This is stark when considering that fifteen percent of New Jersey residents are black, according to the census.⁷⁶ This may be because of the way that New Jersey formulated the CJR.⁷⁷ Because of the fact that the CJR has an algorithmic approach, it may reinforce the pre-existing biases that are present in the criminal justice system.⁷⁸ When this system reinforces these pre-existing biases, it illuminates the point that even a reform of cash bail does not succeed in aiding this social ill, and the correct course of action is to eliminate it completely.

Opponents of the program are making familiar arguments. They argue that the program is releasing potentially dangerous people into the community hours after they are detained for committing a criminal act, endangering public safety.⁷⁹ Further, they state that releasing criminals back into the community before their trial will only lead to more crime.⁸⁰ They are also skeptical

⁷¹ see Anderson, et. al., *supra*.

⁷² see Anderson, et. al., *supra*.

⁷³ see Anderson, et. al., *supra*.

⁷⁴ see Anderson, et. al., *supra*.

⁷⁵ see Anderson, et. al., *supra*.

⁷⁶ see Anderson, et. al., *supra*.

⁷⁷ see Anderson, et. al., *supra*.

⁷⁸ see Anderson, et. al., *supra*.

⁷⁹ see David Matthau, *Is NJ Bail Reform Working, or Just Giving Criminal Suspects a Free Pass?*, New Jersey 101.5 (February 8, 2017), <https://nj1015.com/is-nj-bail-reform-working-or-just-giving-criminal-suspects-a-free-pass>.

⁸⁰ see Matthau, *supra*.

of the computer algorithm, arguing that a computer cannot effectively make decisions into whether people are likely to commit another criminal act, and whether a criminal defendant is going to show up for their court dates.⁸¹

Proponents argue that even if the system isn't perfect, the issue of human rights and fairness require that cash bail be amended.⁸² Even some prosecutors have noted that the CJR was the right thing to do.⁸³ Specifically, they note the advantages of the pre-trial release programs, which monitors those that are released with conditions.⁸⁴ The program allows for the state to prevent new criminal activity and ensure that defendants appear.⁸⁵ However, judges know that it is not time to be complacent, and that the reforms are only as strong as the people tasked with implementing and enforcing them.⁸⁶

New Jersey's reform plan has been a success, but it is not a perfect system. While the system has virtually eliminated cash bail, it has not removed the discrimination in the criminal justice system.⁸⁷ New Jersey needs to work on removing the implicit biases in the algorithm, and police officers need to work on how they issue complaint-warrants.⁸⁸ New Jersey is a model for removing cash bail from the criminal justice system, aiding the mass incarceration problem, but they are also a model in what happens when the changes don't go far enough to fix the racial component of the mass incarceration problem.⁸⁹

⁸¹ see Matthau, *supra*.

⁸² see Matthau, *supra*.

⁸³ see Matthau, *supra*.

⁸⁴ see Matthau, *supra*.

⁸⁵ see Matthau, *supra*.

⁸⁶ see Matthau, *supra*.

⁸⁷ see Matthau, *supra*.

⁸⁸ see Matthau, *supra*.

⁸⁹ see Matthau, *supra*.

New York City

Some local jurisdictions are starting to address cash bail in their own way. New York City started a supervised release program in 2016.⁹⁰ The basic tenant of the program was that as an alternative for defendants who could not afford cash bail, judges can release defendants before trial so long as they meet with a social worker and complete phone check-ins.⁹¹

Upon arrest, criminal defendants are booked and interviewed by a member of the Criminal Justice Agency, who determines the defendant's employer, school, and any family members or community ties.⁹² Then within 24 hours, the criminal defendant goes before a judge, where the court determines if the case will be resolved with a plea deal or if the case will continue.⁹³ If the case is continued, the judge can then set bail, release on their own recognizance, set bail, or enroll in supervised release.⁹⁴

If a defendant is enrolled in the supervised release program, then the judge assesses what level of supervised relief a defendant needs, from level one to four, with level one being the least at risk, and level four being the most at risk.⁹⁵ In order to determine what level applies, the court looks at the kind of crime committed and the defendant's risk category.⁹⁶ Defendants who have committed a misdemeanor and are deemed low risk are level one, whereas felony with aggravating factors and medium high risk are level four.⁹⁷ All high-risk defendants are ineligible for the

⁹⁰ see Onyekwere, *supra*.

⁹¹ see Onyekwere, *supra*.

⁹² see Cindy Redcross et. al., *New York City's Pretrial Supervised Release Program*, Vera Institute of Justice (April 2017), <https://www.mdrc.org/sites/default/files/SupervisedRelease%20Brief%202017.pdf>.

⁹³ see Redcross, et. al., *supra*.

⁹⁴ see Redcross, et. al., *supra*.

⁹⁵ see Redcross, et. al., *supra*.

⁹⁶ see Redcross, et. al., *supra*.

⁹⁷ see Redcross, et. al., *supra*.

program.⁹⁸ Level one defendants get calls and texts from the court to remind them of their court dates, and one monthly meeting with a social worker.⁹⁹ Level four offenders gets calls and texts to remind them of their court date, plus four calls from pre-trial services, and four monthly face-to-face meetings with their social worker.¹⁰⁰

The next step in supervised relief is that the defendant meets with a social worker, who assesses the needs of the criminal defendant, and creates a check-in schedule based on the supervision level determined at arraignment.¹⁰¹ In the meetings with social workers, the defendant and social worker can work on finding community programs and services that can help defendants from committing further criminal acts.¹⁰² The social worker then presents progress reports at all future court dates.¹⁰³ If a defendant fails to appear for a meeting, misses a call, or reoffends, then the social worker must report it within 48 hours.¹⁰⁴

The supervised release program was used for black defendants more than any other group.¹⁰⁵ Forty-seven percent of all defendants in the program were black, with Hispanic defendants comprising thirty-five percent of the program.¹⁰⁶ For all defendants eligible for the program from March-December 2016, forty-six percent were steered into the supervised release program, and only twenty-two percent had bail set.¹⁰⁷

Proponents of the program talk about how important it is to have a program that allows defendants to be released before their trials.¹⁰⁸ Further, it allows defendants who would otherwise

⁹⁸ see Redcross, et. al., *supra*.

⁹⁹ see Redcross, et. al., *supra*.

¹⁰⁰ see Redcross, et. al., *supra*.

¹⁰¹ see Redcross, et. al., *supra*.

¹⁰² see Redcross, et. al., *supra*.

¹⁰³ see Redcross, et. al., *supra*.

¹⁰⁴ see Redcross, et. al., *supra*.

¹⁰⁵ see Redcross, et. al., *supra*.

¹⁰⁶ see Redcross, et. al., *supra*.

¹⁰⁷ see Redcross, et. al., *supra*.

¹⁰⁸ see Redcross, et. al., *supra*.

be detained for being unable to pay bail to be released.¹⁰⁹ It also connects support services to those that need it.¹¹⁰ In addition, pre-trial services providing court date reminders provides an invaluable service to defendants to secure their appearance.¹¹¹ In fact, the appearance rate for defendants in the program is eighty-eight percent.¹¹²

Opponents say that the program is costly and not returning the benefits it was supposed to. Some prosecutors feel that there is little evidence to support the notion that pre-trial services are actually the program that is returning the defendants to court.¹¹³ Further, some are critical that judges are widening the net on supervised release, when some of the defendants being enrolled in the program could be released on their own recognizance, which would not require the meetings, phone calls, and other things that supervised release requires.¹¹⁴

There is an emerging theory that there is a middle ground in enrolling defendants in supervised release.¹¹⁵ However, there is no consensus on what crimes should be best suited to fall into supervised release, and what defendants are best equipped to handle the program.¹¹⁶ There is agreement that stakeholders coming together to talk about this in a responsible way is critical.¹¹⁷ Anything less will perpetuate mass incarceration, the racial disparity in criminal justice, and risk losing any and all progress that's been made.

POLICY SOLUTIONS FOR CASH BAIL

While there are varying approaches to mass incarceration, and benefits and detriments to all the approaches, jurisdictions are starting to move toward reforming the cash bail system.

¹⁰⁹ see Redcross, et. al., *supra*.

¹¹⁰ see Redcross, et. al., *supra*.

¹¹¹ see Redcross, et. al., *supra*.

¹¹² see Redcross, et. al., *supra*.

¹¹³ see Redcross, et. al., *supra*.

¹¹⁴ see Redcross, et. al., *supra*.

¹¹⁵ see Redcross, et. al., *supra*.

¹¹⁶ see Redcross, et. al., *supra*.

¹¹⁷ see Redcross, et. al., *supra*.

Assessing cash bail and detaining those that are too poor to pay it, is becoming an untenable situation for the criminal justice system and the defendants who get swept up into it. In addition, there is a stark racial disparity in how bail is assessed, with black and brown defendants being charged the highest bail across the country.¹¹⁸

There should be two parts to any possible solution to reforming cash bail. Cash bail needs to be abolished and replaced with pre-trial services. This policy is likely to yield the best results for criminal defendants, law enforcement, and the criminal justice system. Further, it would reduce the problem with mass incarceration, and end one tool used to disproportionately suppress minority defendants who get swept up into the system.

First on the issue of ending cash bail. Illinois was the first jurisdiction to completely end the practice, and the data is not in on how that affected the criminal justice system. Curiously, though, in jurisdictions that have it available but discourage it, like New York and New Jersey, have seen an increase in positive outcomes for defendants who would have been detained if not for the cash bail reforms.¹¹⁹

However, the successes of New York and New Jersey are not enough to be complacent with the establishment of cash bail alternatives. As seen in New Jersey, algorithms create issues that preserve the systemic racism of the criminal justice system and mass incarceration.¹²⁰ The New Jersey plan shows that people cannot be trusted to create a system that is completely race neutral. Instead, there must be a solution that ends pre-trial detention, and eliminates cash bail completely so that it is not an option made available to be weaponized against poor people and people of color, furthering mass incarceration.

¹¹⁸ see Gupta et. al., *supra*.

¹¹⁹ see Anderson et. al., *supra*.; see also Cindy Redcross et. al., *supra*.

¹²⁰ see Anderson et. al., *supra*

The elimination of cash bail will not completely fix the mass incarceration problem that comes with ending cash bail. A system needs to be put in place that presumes pre-trial defendants are innocent, and that they are presumed to return to court. Then, in a hearing before a judge, the defendant can be released on their own recognizance, released with pre-trial services, or detained awaiting trial only if they are high risk to flee or commit another criminal act. By establishing pre-trial services, it allows criminal defendants to preserve their innocence while pre-trial, eliminating plea deals made only to get out of jail, ensuring that no one will be faced with the decision that Devereaux Wolf had to make.¹²¹ Further, this system would encourage appearances by criminal defendants, and giving them the best opportunity to stay out of jail by making all their appearances. Even further, criminal defendants would have the best opportunity to keep their jobs, kids, homes, and domestic life. By preventing needless pretrial detention, criminal defendants also won't be looped into a cycle of criminality like Bernie Baker.¹²²

This hybrid approach is the most sensible solution to meet the needs of law enforcement and the criminal justice system and balance them with the rights of criminal defendants. While not perfect, and still relying to some extent on the human element of justice, this approach will ensure that no one is sitting in jail because they are unable to pay their bail. It will also ensure that the system is giving criminal defendants the best opportunity to gain and maintain their pre-trial release. By ending cash bail and encouraging pre-trial release, removing most judicial discretion, the racial disparity in the assessment of bail would be eliminated and any systemic issues in the arraignment proceedings would be greatly reduced.

¹²¹ see Rockett, *supra*.

¹²² see Collins, *supra*.

CONCLUSION

Cash bail was intended to create a system that ensured criminal defendants would appear for their court dates. However, in practicality, it created a system that propagated mass incarceration, especially against people of color. In that system, commercial bail bondsman flourished, while the poorest Americans sat in jail for crimes they were still legally presumed to be innocent of. In some jurisdictions, black defendants were paying 69% of the bail, despite being 30% of the jurisdiction's population.¹²³

Jurisdictions started enacting reforms to try and fix these problems. Some, like Illinois, completely abolished the practice. Others, like New York and New Jersey, highly discouraged the practice in favor of pre-trial services. These services look to keep people out of jail awaiting trial, while also ensuring their appearances. These programs looked to keep criminal defendants out of jail, especially those who could not afford their bail. All of the programs have been met with mixed reactions and mixed results. Proponents will argue that it is a necessary reform to end systemic inequality in criminal justice, while opponents will argue that ending cash bail practices make communities less safe. A hybrid approach that ends cash bail and promotes the use of pre-trial services will ensure that the needs of the system and the rights of criminal defendants are weighed against each other, and promote equality in the system, allow criminal defendants to stay out of jail awaiting trial, and end the systemic racism and mass incarceration that permeates the bail process.

¹²³ see Gupta et. al., *supra*.

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