

## How Cash Bail Negatively Affects the United States

By Jessica Savage

Cash bail has been prevalent within the bail system.<sup>1</sup> Cash bail is a system that requires a payment order to be released pretrial, if the person in question is granted the option of bail.<sup>2</sup> When the person returns to court for the trial, the court will immediately reimburse the payment that was made.<sup>3</sup> However, with the current system, unless the person can come up with the money for the cash bail, they are imprisoned until the trial or until they can procure money for payment. The result of the cash bail system has been that incarceration rates have skyrocketed, filling jails with technically innocent people who have been accused of crimes from misdemeanors to felonies.<sup>4</sup> Because of cash bail, incarceration rates have risen for all offenses, including violent, property, drug, weapon, and public order crimes between 10 to 664% from 1995 to 2010.<sup>5</sup> According to the Hamilton Project, this drastic incarceration increase costs taxpayers over 11 billion dollars a year.<sup>6</sup> Not only does cash bail cost taxpayers billions a year, it also causes jails to be occupied with mostly minorities and those who live in poverty.<sup>7</sup>

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<sup>1</sup> Melissa Neil, *Bail fail: Why the US should end the practice of using money for bail*, JUSTICE POLICY INST., <https://perma.cc/QEW6-VEA2> (2012).

<sup>2</sup> Mohammad B. Sardar, *Give Me Liberty or Give Me... Alternatives?: Ending Cash Bail and Its Impact on Pretrial Incarceration*, BROOK. L. REV., 84(4), 9., (2009), <https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=2217&context=blr>.

<sup>3</sup> Id.

<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> Neil, *supra* note 1.

<sup>7</sup> Sardar, *supra* note 2.

There are many cases where people spend weeks, months, or even years in jail before they can see a judge for crimes that may only result in a fine or just a few days in jail.<sup>8</sup> Imagine being detained pretrial for weeks or even months for a crime that you allegedly committed. Imagine being promised that you are “innocent until proven guilty” but still have to sit in jail simply because you cannot afford the bail amount that was set by the court. Ultimately, the cash bail system causes a cycle of social and economic inequalities among people of color and people of poverty. This system also infringes on an American’s Eighth and Fourteenth Amendment rights.

The Eighth Amendment of the U.S. Constitution prohibits cruel and unusual punishments and also includes the clause for “excessive bail and fines.”<sup>9</sup> In 1789, the First Congress adopted the Eighth Amendment while passing the Judiciary Act of 1789.<sup>10</sup> During that time, the cash bail system closely resembled English law. These similarities include provisions for situations where a defendant had the right to be released, a habeas corpus procedure, and the protection against excessive bail.<sup>11</sup> Although these systems had subtle differences, the concept was the same. The 1800s was the start of the change including the addition of cash payments in exchange for pretrial release if the defendant was of no threat to the community.<sup>12</sup>

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<sup>8</sup> Id.

<sup>9</sup> U.S. CONST. amend. VIII.

<sup>10</sup> Patricia M. Wald & Daniel J. Freed, *The Bail Reform Act of 1966: A Practitioner's Primer*, AM. BAR ASS. J. 52, no. 10: 940-45., (1966), available in JSTAR, [www.jstor.org/stable/25723775](http://www.jstor.org/stable/25723775).

<sup>11</sup> Sardar, *supra* note 2.

<sup>12</sup> Id.

The Bail Reform Act of 1966 granted newer and additional conditions for pretrial defendants.<sup>13</sup> The conditions that were to be considered included facts concerning the family of the accused, the work history and community activeness, and criminal history.<sup>14</sup> The Bail Reform Act of 1966 was later amended due to public reactions to circumstances where pretrial defendants were released and those defendants continued to commit similar crimes.<sup>15</sup> Subsequently, Congress implemented the Comprehensive Crime Control Act of 1984 while also amending the Bail Reform Act of 1966.<sup>16</sup> The changes to this act included the determination of a defendant's dangerousness to society directly resulting from the famous court case, *US v. Salerno*.<sup>17</sup> Prosecutors considered that the defendant, Salerno, was allegedly a large part of the La Casa Nostra crime family and that the safety of the community was more important than his individual freedom.<sup>18</sup>

The cash bail system aids in the continuous cycle of social and economic inequalities that exist in America today. People in poverty are hit the hardest when it comes to determining pretrial decisions. According to a study of felony defendants in large urban counties, around 34 percent of the 70 percent of defendants detained pretrial were continued in detention because of the inability to raise enough funds to post bail.<sup>19</sup> This leads to

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<sup>13</sup> Warren Miller, *The Bail Reform Act of 1966*, CATH. U. L. REV., <https://scholarship.law.edu/cgi/viewcontent.cgi?article=2796&context=lawreview>.

<sup>14</sup> *Bail Reform Act of 1966*, Public Law 89-465 (June 22, 1966), <https://www.govinfo.gov/content/pkg/STATUTE-80/pdf/STATUTE-80-Pg214.pdf#page=4>.

<sup>15</sup> Sardar, *supra* note 2.

<sup>16</sup> *S.1762 - Comprehensive Crime Control Act of 1984*, Congress.gov, <https://www.congress.gov/bill/98th-congress/senate-bill/1762>.

<sup>17</sup> *United States v. Salerno*, 481 U.S. 739, 741 (1987).

<sup>18</sup> Neil, *supra* note 1.

<sup>19</sup> Id.

a strikingly high number of minorities and poverty-stricken people remaining incarcerated. For instance, Kaleif Browder was 17-years-old when police officers arrested him for allegedly stealing a backpack.<sup>20</sup> Making an attempt to console the 17-year-old, they told the teen that he would most likely be let go.<sup>21</sup> However, Browder spent 3 years in one of the most infamous jails in the U.S., Rikers Island. Within those 3 years of the teen being detained, he spent 2 years in solitary confinement. The ultimate reason why Browder stayed in jail for 3 years was because he could not afford the \$3,000 bail that was set for his release. Unfortunately, Kaleif Browder committed suicide at the age of 22.<sup>22</sup> This tragedy happened because Browder's family was not able to come up with \$3,000. This is just one of many cases of "excessive fines."

To many, this may be seen as "unconstitutional," to deny people who have not been found guilty of any crime of the rights to work and live. The requirement for payment may not be a problem for those who have financial assets. But for those who cannot make the cash bail payment, they are deprived of the right to work and live just because they aren't wealthy enough. To others and apparently to the constitution, the "one size, fit all" model is effective. If bail is set higher than the defendant or the defendant's family can afford, then the bail that was set is obviously excessive, even by definition. Kaleif Browder would not have been denied 3 years of his life as a 17-year-old, nor would he have spent 2 years in solitary confinement. Browder should have been recognized as innocent until proven guilty by a court of law. The court system failed to protect one of its legally innocent citizens.

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<sup>20</sup> Sardar, *supra* note 2.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

A person's Fourteenth Amendment right may also be infringed upon by the cash bail system. The Fourteenth Amendment includes the Equal Protection Clause, expressing that the "...government body may not deny people equal protection of its governing laws."<sup>23</sup> The whole concept of the bail system infringes on this promise of protection from an economical perspective. The fact that two people can commit the same crime and have two different pretrial detention outcomes just because of someone's financial ability to post bail proves the unfairness toward people of lower socio-economic backgrounds. Being detained pretrial because a person is not able to afford the bail fee should be deemed as economic discrimination. According to the study conducted by the Hamilton Project about pretrial incarceration for 2018, taxpayers contributed over 11 billion dollars a year to jails where most pretrial detainees are held.<sup>24</sup> Not only does the cash bail system aid in a wasteful economy, but it also continues this tragic cycle of poverty for mostly minorities. It takes approximately \$140 a day to house and feed an inmate that has not been convicted of a crime.<sup>25</sup> Taxpayers contributed over \$100,000 to Kaleif Browder's stay in jail for 3 years. All for someone who has never been convicted of a crime and was later released. Instead of the court protecting Browder, the court protected the economic interest of the jail.

Pretrial detainment has an effect on the increase of minorities and people in poverty in US prisons.<sup>26</sup> Defendants who post bail are less likely to be actually sentenced for a crime. This is because the defendant's counsel would be less likely to efficiently prepare a defense with the defendant due to a plethora of reasons, but one of the reasons is because jails are

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<sup>23</sup> U.S. CONST. amend. XIV.

<sup>24</sup> Neil, *supra* note 1.

<sup>25</sup> Id.

<sup>26</sup> Sardar, *supra* note 2.

typically far from most courts which hinders the communication between the attorney and the client.<sup>27</sup> Also, guilty pleas are often used with pretrial detainees in an effort to obtain a shorter sentence, even for detainees who may or may not have committed a crime.<sup>28</sup> Even though African Americans and Latinos make up 30% of the population, they account for over 51% of the jail population in the U.S..<sup>29</sup> Although bail amounts are relatively similar for all defendants, those without financial support are at a distinct disadvantage.

Progressive and safer alternatives, such as electronic monitoring and the automatic release of pretrial defendants who were charged with misdemeanors, can drastically increase the safety and well-being of these presumed innocent people. Electronic monitoring is a monitoring system that includes an ankle bracelet connected to a retriever called the Global Positioning System receiver which keeps up with a pretrial defendant for 24 hours a day.<sup>30</sup> Defendants are obligated to ask permission to do certain activities that involve leaving one's home. However, the electronic monitoring system is not a perfect system. Although electronic monitoring does not reduce the number of defendants who skip court appearances, is a safer and more constitutional method for pretrial defendants accused of misdemeanors.<sup>31</sup> This method provides safe process for our presumed innocent. The electronic monitoring system helps the defendant and drastically reduces the cost for housing of pretrial defendants which could save millions a year, even billions.

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<sup>27</sup> Id.

<sup>28</sup> Id.

<sup>29</sup> Id.

<sup>30</sup> Id.

<sup>31</sup> Id.

Another way to fight the disparities of cash bail and to affirm that a person is legally innocent until proven guilty is for the courts to free all defendants who are accused of misdemeanors.<sup>32</sup> If this compromise ever goes into effect, the mass incarceration rates will drop tremendously. Of course, there would be a system set so that these free pretrial defendants can “check in” to ensure their potential appearance in court either by text or physical appearance. Not only does this proposed system reduce the billions spent to house pretrial defendants, it also helps defendants and their counsel to adequately prepare for their upcoming trial. According to an article in the Brooklyn Law Review, the District of Columbia (D.C.) has successfully eliminated cash bail and enforced pretrial supervision and restrictions after pretrial release. As a result, D.C. has saved over \$390 million annually due to this change.<sup>33</sup>

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<sup>32</sup> Id.

<sup>33</sup> Id.