Abolishing Cash Bail to Promote Social Justice

The primary mission of the social work profession is to enhance human well-being and help meet the basic human needs of all people, with particular attention to the needs and empowerment of people who are vulnerable, oppressed, and living in poverty.

The National Association of Social Workers (NASW) is the largest membership organization of professional social workers in the United States. NASW works to enhance the professional growth and development of its members, to create and maintain professional standards, and to advance sound social policies.
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The National Association of Social Workers (NASW) believes that cash bail policies should be abolished nationwide to promote social justice by addressing gender, racial, ethnic, and socioeconomic disparities. Ending cash bail policies would allow people who are innocent until proven guilty to remain free pretrial. When people fight their cases from the community, rather than jail, they can continue contributing to those communities and avoid the harms caused by incarceration.

Historical Overview

According to the U.S. Constitution, all people accused of crimes are considered innocent until proven guilty. However, some people charged with crimes are incarcerated while they await trial, despite the presumed innocence. A third of them, or about 450,000 annually (Savage, 2016), are incarcerated pretrial because they cannot afford their cash bail. Cash bail is a cash deposit made in exchange for the freedom to await trial at home rather than in jail. The purpose of cash bail is to serve as collateral that would be an incentive for people to appear in court when summoned (Rabuy & Kopf, 2016).

The right to pretrial bail is affirmed in the U.S. Constitution. The Eighth Amendment protects citizens from being subjected to excessive bail and fines. Given that fact, the constitutions of every state include language that establishes the right to bail (Hegreness, 2013), for most defendants. Another important policy that guides pretrial incarceration is the 1974 Speedy Trial Act (Free Dictionary, 2019). Title II of the act authorizes U.S. Courts to establish “demonstration” pretrial service agencies in 10 judicial districts. The goals of this demonstration project were to (a) reduce pretrial incarceration and (b) reduce crime by defendants released from jail pending trial. The program was aimed at individuals—released on bail pending their trial—charged with low-level nonviolent crimes. The original pretrial services demonstration project was managed by the federal parole and probation services. Today pretrial services exist not only in the federal criminal justice system, but also in most states in the United States.

One of the most impactful factors in the nation’s systems of arrest and incarceration is pretrial detention. It is the entry point after individuals are arrested and formally charged with a crime. In the United States a large portion of arrested people are remanded to...
pretrial detention. Eleven million people are admitted to jails annually; on any given day, almost half a million people are awaiting trial in local jails (Stevenson & Mayson, 2017). Recent data indicate that pretrial detainees account for approximately two-thirds of people incarcerated in jails (Stevenson & Mayson, 2017). In addition, the rise in this population has led to 95 percent of the growth in the jail population nationally over the last 20 years (Stevenson & Mayson, 2017).

Every person who is arrested is entitled to a determination to establish whether there is probable cause that they committed a crime. Many state and local jurisdictions call this process a “bail hearing” or “pretrial release hearing.” However, this process is subject to bias. Often, the official who presides over the pretrial release hearing is a magistrate and not a judge—in fact, the magistrate may not even have a law degree. Perhaps more troubling, hardly any systemic reviews and evaluations of the thousands of bail decisions made yearly have been conducted to date.

There are also no national uniform standards or guidelines for determining bail amounts. Some jurisdictions use bail schedules that are guidelines for officials to set a bail amount according to the type of criminal charge (USLegal, 2019a). In others, judges are directed to consider various factors in imposing bail or alternative to incarceration (USLegal, 2019b).

Bail Bondsman Industry

An insidious part of this country’s cash bail system is the bail bond industry. According to the Justice Policy Institute (JPI, 2012),

There are approximately 15,000 bail bond agents working in the United States, writing bonds for about $14 billion annually. Bail bond companies take billions from low-income people, with no return on investment in terms of public safety and added costs to communities, according to JPI’s findings. Backed by multibillion-dollar insurance giants, the for-profit bail bonding industry maintains its hold in the pretrial system through political influence. (para. 2)
It is important to note that the United States is just one of two countries (Lithwick, 2016) that continues to use a cash bail system (the only other being the Philippines). In England and Canada, a third party inserting itself as a bail bondsman constitutes a crime. As stated by the Vera Institute of Justice (Vera Institute of Justice, 2019), for over a century the bail bond industry essentially had one sole purpose, which was to ensure a person’s return to court. The sudden increase of crime in the 1970s ignited nationwide law-and-order obsession. The emphasis on public safety as the main rationale for bail emerged. That emphasis was reinforced with a 1987 Supreme Court decision that upheld the Bail Reform Act of 1984.

With the focus on public safety, bail amounts imposed by courts began to increase significantly. With larger bails being set, and the increase of arrests, more people—mostly people of color—were being kept in jail for their inability to pay. The result was a financial boon to the bail bond industry. It also gave bail bond companies more authority within the criminal justice system. Bail bond companies can set nearly any condition on a client until the case is resolved, from daily check-ins to drug tests, without facing much regulation. They often charge additional fees with dubious justification. If a defendant refuses any of these terms or misses a payment, the bondsman can threaten to forfeit the bail, which could land the client back in jail.

An example of the harm caused by the bail bond industry was laid out in a lawsuit filed (Southern Poverty Law Center, 2017) against a bail bond company owned by politically connected bondsmen in New Orleans. This company was accused of charging hundreds of dollars in extra fees and requiring clients to wear GPS monitors. Bail bondsmen who work in Orleans Parish have been overcharging their clients for years and must start issuing refunds, at a cost of about $100 for the average bond recipient. A court order assessed a penalty as the company in question failed to provide refunds to nearly 50,000 overcharged clients, a total amount of almost $6 million. The main issue in the lawsuit was the higher rates that most bail bond companies charged in Orleans Parish compared with rates in other jurisdictions in Louisiana. The Louisiana Legislature set a limit for bail bonds at 12 percent of the total bail amount. However, as far back as 2005, bondsmen in Orleans Parish arbitrarily charged 13 percent. The extra 1 percent in bail bond “premium” collected in Orleans Parish went to the budgets of the criminal court.

**Damage Caused by Cash Bail**

During pretrial incarceration people are harmed in several ways, as incarceration leads to poorer health, lost employment, lost housing, lost custody of children, diminished contact with family and friends, and lost freedom. Pretrial incarceration harms not only the people who are incarcerated but also the communities that these people call home through the loss of their community member’s engagement and work. This lost work is also expensive, as it leads to lost revenue for businesses and in the form of taxes. Pretrial incarceration also has direct costs, as it is financed through taxes. The annual estimated costs of pretrial incarceration in the United States is $13.6 billion (Wagner & Rabuy, 2017).
Many recent studies have shown that pretrial detention increases a defendant’s chance of being convicted and the likely length of their sentence. Because of this, pretrial incarceration can be the beginning of a cycle of incarceration, as the longer people spend incarcerated pretrial the more likely they are to also plead guilty (Sacks & Ackerman, 2012). For someone who has awaited trial in jail for months or years a plea bargain can seem like their only way out. This pressure is something that people awaiting trial in their homes do not face. The increase in convictions is primarily an increase in guilty pleas among defendants who otherwise would have had their charges dropped. The plea-inducing effect of detention undermines the legitimacy of the criminal justice system itself—especially if some of those convicted are innocent. Moreover, two recent studies have found evidence that pretrial detention increases the likelihood that a person will be rearrested.

In comparison with defendants who are released pretrial, defendants who remain in jail (a) plead guilty more often, (b) have a higher rate of conviction and are sentenced to jail at a rate three to four times higher than their counterparts (Allen, 2015, (c) receive jail sentences that are often three times longer, and (d) are sentenced to prison at a rate three times higher for sentences that are twice as long.

**Criminalization of Poverty**

In general, the U.S. prison system is populated with men and women who are on the periphery of the national economy. Most of them have very limited education and job
skills, which hampers their ability to access good jobs. Recent studies have shown that in 2014, incarcerated people had a median annual income of $19,185 prior to their incarceration, which is 41 percent less than for nonincarcerated people of similar ages (Liu, Nunn, & Shambaugh, 2019).

The use of cash bail is part of a greater trend toward an increase in the expenditures on police, corrections, and the judiciary in conjunction with a reliance on the use of monetary sanctions in the criminal justice system to fund this increase (Justice Policy Institute, 2012). For example, courts assessed monetary sanctions from two-thirds of incarcerated people. Given that people who are incarcerated are more likely to also have low levels of income, this serves as a regressive mechanism of revenue collection. In addition, criminal justice debt can trap people in the criminal systems, as it is a significant factor in reincarceration. Therefore, monetary sanctions are disproportionately unfair to people who are low-income.

In many jurisdictions around the country, probation supervision monitors people pretrial and may be outsourced to private companies. Advocates and researchers have uncovered widespread abuse by private probation companies, often growing out of misaligned incentives that link a company’s revenue to fees imposed on probationers. Along with partners in Georgia, the Criminal Justice Policy Program [n.d.] has launched several projects to reform unfair practices connected to private probation.

Racial, Ethnic, and Gender Disparities as a Pervasive Factor

Poverty is a critical factor in the unfair and inequitable use of cash bail, but gender, race, and ethnicity—when combined with poverty—paint a more devastating picture of the disparate impact of cash bail. For example:

» Women are less likely to be able to afford cash bail. A study found that women incarcerated pretrial earned scarcely more per year than the average bond amount of $10,000.

» Monetary sanctions are used disproportionately more in cities with a large black population.

» Compared with white men charged with the same crime and with the same criminal histories, African American men have bail set at amounts 35 percent higher; Hispanic men have bail set at amounts that are 19 percent higher (Gelbach & Bushway, 2011).

» Among people who cannot afford to pay their cash bail, black and Hispanic people have twice the odds of being convicted and sentenced to incarceration, as compared with white people (Demuth & Steffensmeier, 2004).

» In a University of Minnesota study on pretrial release, white defendants were at least twice as likely to be released without any bail conditions than defendants of color (Allen, 2015).

» On average black and Hispanic detainees have higher rates of justice contact, higher rates of poverty, and higher rates of pretrial detention than their white counterparts (Allen, 2015).
Children of Parents Held in Pretrial Detention

An extremely troubling consequence of pretrial incarceration is impact on children of parents who are incarcerated. Research indicates that the cash bail system disproportionately punishes low-income black families (Arnold, 2018). Broadly speaking, one in nine (Pew Charitable Trusts, 2016b) black children in the United States has had an incarcerated parent, compared to one in 28 Hispanic children and one in 57 white children. In all, 2.7 million children (Pew Charitable Trusts, 2010) in this country have at least one parent who is incarcerated. This results in an intersection between criminal justice and child welfare agencies, often in the form of child protective services, and the potential for family disunity when a parent is forced to remain in jail because they cannot pay even a small cash bail.

For these individuals, even a short stay in jail can quickly unravel lives and families (Dewan, 2015). We already know that the criminal defendants are overwhelmingly poor, and detention—even for less than six months—can cause job losses and evictions from their homes. In many cases, parents lose custody of their children and may have a difficult time regaining custody, even when cases are ultimately dropped. An overlooked fact is that innocent people in jail routinely accept plea deals to avoid those child welfare collateral consequences. Such plea deals leave them with permanent criminal records.

Pretrial Risk Assessments

There is a growing national consensus that the cash bail system in the United States is greatly flawed and that major change is needed. One of the leading policies to address this issue is the use of risk assessment to inform the use of preventive detention. However, this process can also perpetuate racial and socioeconomic bias (Berk, Heidari, Jabbari, Kearns, & Roth, 2017; Chouldechova, 2017; Starr, 2014; Tonry, 2014).

What Are Risk Assessments?

Risk assessments are essentially a process, or a tool that federal and state courts use to decide whether someone is too dangerous to release or a “flight risk”—meaning that they are not likely to show up for trial. Technically speaking, there are two types of assessments: clinical and algorithmic. In a clinical assessment, a psychologist or clinician (such as a social worker) completes a behavioral health and psychosocial evaluation on an individual (Thompkins, 2019). Algorithmic risk assessments were developed as a purported improvement on or replacement of clinical assessments. Algorithmic assessments use data, statistics, and social science to categorize a person’s risk level based on their responses to questions or data about them. Typically, the results of these assessments are expressed using a numerical risk score and a designation of low, medium, or high risk.

The Problem with Risk Assessment Tools and Preventive Detention

There are those who believe that risk assessments can potentially help to reduce the frequency of the use of bail. Theoretically, correctional officials may argue that risk assessments can assist in better determinations of those detainees who truly are too dangerous to be released back to the community while awaiting trial, thus limiting the frequency of detaining people because they are too poor to post bail.
However, there is a growing number of advocates and corrections experts who are less enthusiastic about the validity of algorithmic risk assessment. As noted by former attorney general Eric Holder (Thompkins, 2019), algorithmic risk assessments are built on data, and those data can reflect the systemic bias of the criminal justice system. For example, a prior arrest might make someone look riskier to an algorithm. But based on current data, it is known that people of color are more likely to be arrested than whites for the same crime. Despite relying on so-called neutral data, risk assessments might reinforce implicit bias on the part of some judges. There is recent research suggesting that these concerns are well-founded (Angwin, Larson, Mattu, & Kirchner, 2016). More research can help determine how to create effective, unbiased risk assessments.

Preventive detention also causes harm and is not a viable crime reduction strategy. Since nearly all incarcerated people eventually return to the community, the incapacitating effect of incarceration is not permanent. Rather, the effect of incarceration is that it makes people more likely to be rearrested (Robinson, 2001). For example, for defendants assessed as both low and medium risk, being incarcerated pretrial for any length of time makes them more likely to be rearrested and less likely to appear in court (Allen, 2015). Risk assessment tools and preventive detention are also very expensive and have not historically delivered on their promise to reduce costs (Hernandez, 2007).

Suggested Policies
Cash bail should be abolished, as it is harmful and does not promote public safety. Making this change is possible and has already been embraced by six states (Alaska, California, Colorado, Kentucky, New Jersey, New Mexico). Most of these state policies are new, but data from Alaska and New Jersey indicate an expected decrease in the number of people incarcerated pretrial (New Jersey Courts, 2017; Pew Charitable Trusts, 2016a) without a uniform increase in crime (Uniform Crime Reporting Unit, 2017). Risk assessment tools should not be adopted instead. In place of cash bail, personal recognizance should be used, a form of bail where people can await trial at home on their word that they will appear when summoned to court. This policy upholds the presumption of innocence and promotes community cohesion.

Commercial bail bondsmen should be eliminated. Their corrupting influence does not promote justice and harms disenfranchised populations. Five states (Illinois, Kentucky, Massachusetts, Oregon, and Wisconsin) have already taken steps to eliminate commercial bail bondsmen. In many cases in those states, deposits are made to the courts. Some judges and advocates have also suggested that if cash bail exists, there may be a place for nonprofits to become involved in the bail process to better serve the needs of communities. The National Conference of Chief Justices and American Bar Association have also suggested a move away from a for-profit bail bond system.

Ability to pay monetary sanctions must be assessed in any jurisdictions where fines and fees remain. However, ideally regressive fines and fees should be eliminated in the criminal justice system to stop the criminalization of poverty through monetary sanctions. As a
harm reduction strategy in jurisdictions where fines and fees are still collected, the calculation of a person’s ability to pay the criminal justice system could begin with an assessment of income and a subtraction of deductions for basic needs and other expenses. Deciding what constitutes income and what deductions should be allowed, however, is more complicated. For example, lawmakers must consider how to treat public benefits, volatile income, family members’ income, and other potential sources of income. Lawmakers should exclude from base income funds set aside for education, the support and care of people with disabilities, or other particularized needs (as is often done in the public benefits and student aid contexts).

A flat reduction in monetary sanctions should be considered carefully. Under a flat reduction approach (The Hamilton Project, 2019), once a person’s net income is determined to be under a given threshold, courts would reduce the baseline economic sanction by a fixed percentage. The advantage of this approach is the ease of application; the disadvantages are that (a) it offers no relief for people who are slightly over the qualifying financial threshold and (b) it may offer insufficient relief to those with very low (or no) net income. Therefore, this method of graduation may be best suited for relatively minor violations for which economic sanctions are typically small.

Sliding scales of monetary sanctions can offer more flexibility. Another alternative is the use of a sliding scale (The Hamilton Project, 2019), which offers more precision. Under this approach, the assessed sanction declines as the person’s ability to pay becomes more limited. This likely does not create significant administrative burdens beyond that of the flat reduction approach, as the sliding scale could easily be applied to standardized forms linking income levels with percentages of deduction. The advantages of the sliding scale approach over the flat reduction are two-fold. First, it allows for economic sanctions that are more precisely tailored to the circumstances of the individual and that do a better job of balancing deterrence and ability to pay. Second, it avoids arbitrary and abrupt changes in sanctions as net income approaches a threshold.

Overarching recommendations include assessing the disparate impact of new policies. Because policies governing pretrial incarceration have historically served to further oppress already marginalized populations, disaggregated data must be collected to ensure that any new policies are not perpetuating these historic inequities. In addition to avoiding causing further harm, attention should also be paid to repair past harms by financially investing in marginalized communities using any savings from reduced criminal justice spending.

Implications for Social Work Practice
Social workers play a vital role in delivering services and advocating for legally involved clients. Although only 3 percent of social workers are directly employed in settings related to justice, public order, and safety activities (Salsberg et al., 2017), social workers frequently interface with legally involved clients through their work in other settings. For example, social workers working with at-risk youths may regularly have clients who are arrested and face pretrial incarceration. Social workers in these roles
may play a role in both advocating for their client’s release from pretrial detention and connecting their clients to additional supports that may assist them while they fight their case. Direct advocacy to the court should be done with the client’s consent and could include writing a letter to the court or accompanying the client to court.

Social workers who do work directly in the criminal justice system play an important role in assisting with the defense of clients or delivering services to clients with an active legal case. Services that may be helpful for clients who are facing pretrial incarceration include a referral to a community bail fund or a participatory defense group. A community bail fund can pay a cash bail on behalf of a client, whereas participatory defense groups provide nonmonetary support that may aid a client and or their family in advocating for a cash bail amount to be reduced or eliminated, in addition to providing other support.

Social workers can also engage in legislative advocacy to seek the elimination of cash bail and challenge the use of cash bail and its associated effect on the criminalization of poverty by working to organize a larger coalition of interdisciplinary organizations to abolish cash bail. A useful informational resource toward that effort is the Primer on Bail Reform, which provides guidance on navigating the legal and policy terrain of pretrial justice in a system that moves beyond cash bail.

References


NASW Resources

NASW » SocialWorkers.org

NASW Foundation » NASWFoundation.org

NASW Press » NASWPress.org

NASW Assurance Services, Inc. » NASWAssurance.org

NASW Center for Workforce Studies » Workforce.SocialWorkers.org

Help Starts Here » HelpStartsHere.org

Social Work Reinvestment Initiative » SocialWorkReinvestment.org

Social Work Policy Institute » SocialWorkPolicy.org

Social Work Portal » SocialWorkers.org/swportal

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