

Testimony of Prison Fellowship
Before the U.S. House Committee on the Judiciary
The Administration of Bail by State and Federal Courts: A Call for Reform
November 14, 2019

Prison Fellowship® is the nation’s largest Christian nonprofit serving prisoners, former prisoners, and their families, and a leading advocate for criminal justice reform. The organization was founded in 1976 by Charles Colson, a former aide to President Nixon who served a seven-month sentence for a Watergate related crime. For over 40 years, our ministry has shared the new hope and life purpose available through Christ with men and women in prison. Those who once broke the law are transformed and mobilized to serve their community, replacing the cycle of crime with a cycle of renewal.

Our prison events, classes, and programs reach more than 375,000 prisoners each year. We have over 11,200 Prison Fellowship volunteers across the United States who make it possible to serve people in prison and more than 300,000 children of incarcerated parents annually. One hundred and thirty federal prisons participate in our Angel Tree program and several federal prisons have Prison Fellowship connection classes, which include Bible studies, recovery groups, and seminars on parenting, anger management, and more.

Understanding Monetary Bail and Bond System

On any given day, roughly 460,000 citizens are incarcerated in our nation’s jails prior to any trial or conviction.¹ These men and women now comprise “about 65 percent of the jail population”—a striking increase from 1990, when about half of individuals in our jails had not yet been convicted of a crime.² This explosion of pretrial detainees is all the more striking when considering the broad nationwide decline of both arrests and crime over the same period.³ With pretrial detainees now constituting nearly a quarter of our nation’s incarcerated population, we applaud the House Judiciary Committee for evaluating how federal and state policy considers these fellow citizens in relation to our shared commitments to due process, human dignity, and public safety.

When an individual is arrested and charged with a crime, the path to a trial and determination of case can range widely. A judge may decide that a person’s risk of flight or danger to the community make no pretrial release appropriate under any circumstances. Alternatively, a judge can release a defendant on recognizance, making a judgement that the defendant is highly likely to return to court without harming anyone in the community. A judge can also impose conditions of pretrial release, whether non-

¹ Patrick Liu, et al., *The Economics of Bail and Pretrial Detention*, The Hamilton Project (December 2018), https://www.hamiltonproject.org/assets/files/BailFineReform_EA_121818_6PM.pdf.

² *Id.* at 3-4.

³ *Id.* at 4.

financial (supervision), financial, or property suretyship. If financial, the system of monetary bond and bail can depend on jurisdiction. In order to meet the obligation of a monetary bail, a defendant may post the full amount (or in some jurisdictions, a percentage of the full amount) or secure a posted bond through an agreement with a licensed and bonded agency. The bondsmen may assume liability if the defendant fails to appear in court, or post 10 percent of the bail amount to the court, while being liable for the full bail amount if they fail to appear at court.⁴ These financial requirements can make it very difficult for indigent defendants to avoid pretrial detention. The cost of bail, not automatic ineligibility for release, significantly impacts why the majority of pretrial detainees remain in custody.⁵

The use of monetary bail and bond is far from a recent phenomenon. In much of Anglo-American legal history, criminal justice practitioners understood these financial requirements for release as a means to safely avoid jail overcrowding and provide a strong incentive for defendants to responsibly behave in the community before court appearances. But concerns about the extent to which excessive bail amounts with little rationale in public safety can undermine the presumption of pretrial liberty, specifically for more indigent defendants, have long been voiced in our legal history, whether in the Eighth Amendment’s prohibition against “excessive bail,” Robert F. Kennedy’s bail reform advocacy, and the late Supreme Court Chief Justice William Rehnquist’s remarks in the *United States vs. Salerno* ruling that “in our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”⁶

Bail and the Rule of Law

Our current system for determining pretrial detention should unsettle all American citizens who value the core principles of our legal order—due process, robust defense counsel, and the ability of any American accused of a crime to vigorously challenge the charges placed against him or her. Studies have made clear that individuals unable to pay bail who remain in pretrial detention face substantially different outcomes in the legal system than comparable individuals who were released. A rigorous study of hundreds of thousands of misdemeanor cases in Harris County Texas found that detained defendants are “25% more likely than similarly situated releasees to plead guilty.”⁷ Facing the debilitating consequences of pretrial detention on themselves and their loved ones, defendants face an immense pressure to waive their constitutional right to a fair trial—therefore augmenting our justice system’s existing reliance on plea bargaining as a means of adjudicating charges.

⁴ *Id.* at 3.

⁵ *Id.*

⁶ U.S. Const. amend. VIII; *United States v. Salerno*, 481 U.S. 739, 755 (1987); Timothy R. Schnacke, et al., *The History of Bail and Pretrial Release*, Pretrial Justice Institute (September 2010), https://b.3cdn.net/crjustice/2b990da76de40361b6_rzm6ii4zp.pdf.

⁷ Paul Heaton, et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711 (2017), <https://review.law.stanford.edu/wp-content/uploads/sites/3/2017/02/69-Stan-L-Rev-711.pdf>.

Furthermore, even when controlling for other factors, pretrial detention corresponds with higher probabilities of severity of sentence, both in type and length. The same study noted above also found detained defendants in Harris County were “43% more likely to be sentenced to jail, and receive jail sentences that are more than twice as long on average.”⁸ A study of over 150,000 Kentucky defendants likewise showed “low-risk defendants who are detained for the entire pretrial period are 5.41 times more likely to be sentenced to jail and 3.76 times more likely to be sentenced to prison when compared to low-risk defendants who are released at some point before trial or case disposition. Moderate and high-risk defendants who are detained for the entire pretrial period are approximately 3 times more likely to be incarcerated than similar defendants who are released at some point.”⁹

The causes of these disparities are varied. During a jail term, an individual will have more limited access to defense counsel and corresponding preparation for court hearings. Additionally, “time in jail may also limit a person’s financial resources to dedicate to the defense.”¹⁰ Finally, an individual released into the community has an opportunity to participate in positive, pro-social behaviors, whether restitution to victims or wider community, job training, or participation in social services, that might augment the chances of “acquittal, dismal, or diversion” for his or her charges.¹¹

Our criminal justice system surely needs to better live up to the promises of adequate defense counsel, right to a fair trial, and proportional sentencing for any man or woman accused of a crime. But we must bear in mind that these ends of our legal system are even more out of reach for economically vulnerable incarcerated individuals who, unable to pay bail, remain in jail.

Bail and Collateral Consequences

Incarcerated men and women who cannot afford monetary bail can experience a myriad of collateral consequences. Pretrial detainees can quickly lose their job or parental custody.¹² Under the Medicaid Inmate Exclusion Policy (MIEP), individuals incarcerated prior to trial and sentencing lose access to vital social insurance programs, including Medicare, Medicaid, and Veteran’s Affairs benefits. Responsibility to provide health services to these individuals, who have not yet even been convicted of a crime, are then transferred on to state governments and local jurisdictions. As the *American Journal of Public Health* warns, local jails “often lack the resources to meaningfully

⁸ *Id.* at 711.

⁹ Christopher T. Lowenkamp, et al., *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, Arnold Foundation (November 2013), <https://csgjusticecenter.org/wp-content/uploads/2013/12/Investigating-the-Impact-of-Pretrial-Detention-on-Sentencing-Outcomes.pdf>.

¹⁰ Leon Digard & Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, Vera Institute of Justice (April 2019), <http://www.safetyandjusticechallenge.org/wp-content/uploads/2019/04/Justice-Denied-Evidence-Brief.pdf>.

¹¹ *Id.*

¹² Emily Leslie & Nolan G. Pope, *The Unintended Consequences of Pretrial Detention on Case Outcomes: Evidence from New York City Arrangements*, 60 *J.L. & Econ.* 529 (2017), http://econweb.umd.edu/~pope/pretrial_paper.pdf.

satisfy Eighth Amendment constitutional protections requiring adequate treatment for inmates or even to meet community standards for care.”¹³ The consequences are deeply unsettling; "Suicide accounts for a third of jail deaths. Alcohol and drug intoxication is a leading cause of death following suicide and heart disease. . . Few facilities employ adequate staff certified in addiction treatment to treat huge caseloads. Few inmates receive guideline-concordant care for withdrawal symptoms, much less for underlying substance use or mental health disorder.”¹⁴

These consequences by no means render pretrial detention an inappropriate tool of law enforcement. But this research demands lawmakers be deeply cognizant of the burdens placed on our fellow citizens who, absent monetary bail, could otherwise return to our communities before trial without substantial flight risk or danger to public safety.

Bail and Public Safety

Heavy reliance on pretrial detention thanks to monetary bail, although intended to serve public safety goals, may actually cement the status quo of crime, incarceration, and recidivism harming our most vulnerable neighborhoods and communities. Under our system of monetary bail and bond, low-risk individuals can actually find themselves gravitating towards criminogenic thinking and behavior during their jail sentence. A pretrial detention can lead to unemployment, a spiral into further addiction, unraveling of family relationships, and sustained contact with peers with more extensive criminal histories. These factors may explain why the risks of recidivism at the end of an 18-month follow up period were substantially higher for pretrial detainees in Harris County relative to comparable individuals who successfully posted bail. In fact, the same researchers concluded “the pretrial detention of 10,000 people charged with misdemeanors could be expected to result in 400 additional felonies and 600 more misdemeanors than if they had been released pretrial.”¹⁵ Thanks to monetary bail’s inability to meaningfully distinguish criminogenic and flight risk levels, far too many of our fellow citizens are placed in conditions where dangers increase of falling into cycles of destructive behavior.

Core Principles for Pretrial Detention

Prison Fellowship believes our current status quo of determining pretrial detention through monetary bail can be replaced with more just, evidence-based approaches. But before deliberating specific policy interventions, we need to have clear first principles.

Prison Fellowship believes that people should be presumed innocent until proven guilty. Consequently, defendants should be free to live in the community until their trial, unless there is objective evidence that they pose an immediate risk of physical harm to another person or a strong risk of not returning for their trial. Pre-trial conditions of release

¹³ Kevin Fiscella, et al., *The Inmate Exception and Reform of Correctional Health Care*, 107 Am. J. Pub. Health 384 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5296706/#bib4>.

¹⁴ *Id.*

¹⁵ Digard & Swavola, *supra note* 11 at 6.

should be used in the least restrictive and most effective ways possible to advance public safety and increase the likelihood defendants show up to court. A pure money bail system used in isolation is an inherently flawed system of determining a defendant's release from a moral standpoint because it's dependent on a person's means alone.

Prison Fellowship is particularly encouraged by new interest from jurisdictions in transitioning away from monetary bail and towards risk assessment tools which can use a variety of key factors to estimate an individual's likelihood of appearing in court without a new arrest. We believe that these risk assessment tools, if made reasonably transparent, open to continued refinement and feedback from outside stakeholders, and constantly updated with new criminal justice data, have the power to positively transform pretrial practices.

Furthermore, Prison Fellowship encourages further experimentation with non-financial conditions for pretrial release. Thinking effectively about pretrial supervision requires a careful balance of two principles. On the one hand, firm methods of accountability must be provided so that individuals return to court without physically harming anyone. At the same time, more intensive forms of pretrial supervision need to be carefully targeted. Without a concrete focus on specific, high-risk defendants, jurisdictions' supervisory systems can waste scarce criminal justice dollars, undermine our broad presumptions of innocence and pretrial liberty, and potentially increase instability and criminogenic risks among low-risk defendants through an excessive web of unnecessary restrictions.

Lessons from the States

Risk assessments have positively adjusted many jurisdictions' approaches to pre-trial detention. New Jersey provides a positive case study here. Prior to its 2017 adoption of a risk and needs assessment after a 2014 amendment to largely eliminate the use of monetary bail and bonds, "75% of the state's jail population consisted of people detained pretrial, and they stayed, on average, 10 months. Many of the people detained were only locked up because they were poor, with 40% unable to afford bail amounts of \$2,500 or less."¹⁶ Transition to the risk assessment yield immediate gains; within six months, "pretrial detention rates dropped by 20% . . . meanwhile, crime rates remained steady or dropped slightly."¹⁷ A similar combination of declining jail populations without harms to public safety can be seen after the adoption of risk assessments by Mecklenburg County (North Carolina), Yakima County (Washington), Cook County (Illinois), and Kentucky.¹⁸

These criminal justice innovations have inspired lawmakers elsewhere. In 2017, Indiana's bipartisan legislation— HB 1137—passed with overwhelming majorities in the

¹⁶ Rachel Elise Barkow, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 59-60 (2019).

¹⁷ *Id.* at 60.

¹⁸ *Id.*; Public Safety Assessment, *Research*, Public Safety Assessment (2019), <https://www.psapretrial.org/about/research>.

state legislature, tasking the state supreme court with designing a pre-trial risk assessment before January 2020.¹⁹ Five counties in South Dakota and Iowa have taken their own initiative in the development of pre-trial risk assessments.²⁰ An Ohio Supreme Court task force on pretrial detention recommended in 2019 the availability of risk assessment to judges “in every municipal, county, and common pleas court when setting bond or conditions of bond.”²¹ Through new reforms in 2017, Illinois has also set a new presumption that individuals facing nonviolent misdemeanors or low-level felonies should be released under non-monetary conditions.²²

Through greater use of a pre-trial risk assessment, policymakers can without undermining public safety move away from—or improve the efficacy and fairness of—monetary bail and expand pretrial liberty for more of our fellow citizens in jail, providing greater continuity and stability in their lives as they prepare for court hearings.

Policy Recommendations

We encourage this Committee to consider how federal funding and technical guidance can contribute to innovations in pretrial detention among state and local jurisdictions, while respecting the principles of constitutional federalism. Thanks to the work of the Justice Reinvestment Initiative, the Office of Justice Programs, and the Bureau of Justice Assistance, breakthroughs have emerged across our nation in community corrections, effective policing, violence reduction strategies, and treatment of defendants and prisoners with mental health and behavioral challenges. We recommend this Committee to explore how this existing infrastructure of Department of Justice guidance and expertise can lead to the wider use and continued refinement of pre-trial risk assessments, improved forms of pretrial supervision, and more equitable methods of monetary bail and bond for indigent defendants.

Thank you for this opportunity to present Prison Fellowship’s policy recommendations to improve our nation’s bail systems to this committee.

¹⁹ Mitch Arvidson, *Time to Bail on Cash Bail?*, Stateline Midwest, April 2019, at 1, <https://www.csgmidwest.org/policyresearch/0419/0419-slmw.pdf>.

²⁰ *Id.* at 6.

²¹ The Supreme Court of Ohio, *Report and Recommendations of The Supreme Court of Ohio Task Force to Examine the Ohio Bail System*, The Supreme Court of Ohio (July 2019), <http://www.sc.ohio.gov/Publications/bailSys/report.pdf>.

²² Arvidson, *supra* note 20 at 7.