Presumed Innocent, Punished Anyway: How Bail, Pretrial Detention, and Plea Deals Perpetuate Injustice

Esmeralda Garcia-Sanchez

Introduction: The Price of Freedom

At 16 years old, New York native Kalief Browder was arrested and held pretrial for three years in Rikers Island due to being unable to afford to pay bail. In his three years incarcerated, he endured abuse, was held in solitary confinement for the majority of his stay, and was severely neglected, all over a crime he was never convicted of– stealing a backpack. After his release due to insufficient evidence leading to dropped charges, and after having his court date postponed over 30 times, the trauma he endured stayed with him and led to his suicide at age 22, two years after his release. Browder's story is not an abnormality; a majority of people in local jails are being held pretrial and detained solely because they cannot afford money bail (Sawyer, 2022), which is a fundamental violation of human rights. This case is a singular example of the consequences of systemic inequality perpetuated by a cash-based bail system, like that used by the United States, where wealth determines freedom.

In a cash bail system, it is presumed that those awaiting trial are offered a reasonable bail offer that can be paid, and those in custody can be released on the condition they return on their assigned court date to face their charges. A cash amount is meant to be paid in place of release until a verdict is reached; as long as the individual attended their court date, they would receive a refund for their fee regardless of a guilty or innocent verdict (Sawyer, 2022). This system was meant to be rooted in the idea that people are presumed innocent until proven guilty, along with the rights provided by the Sixth and Eighth Amendments pertaining to a speedy trial and protection from excessive bail, the reality of it is far from just. Cases in which bail was denied were rare, and excessive cases met with denied bail carried out by a single judge were frowned upon and seen as an unjust abuse of power. It seemed pretty simple: people paid the price, were released while presumed innocent, case overloads were better controlled, people attended their court dates, and as a result, went on with their lives in which the guilty paid their due sentence and the innocent walked free with their money rightfully returned to them. But when money determines justice, the system rapidly loses its integrity.

The Broken Bail System: Exploiting the Vulnerable

Present-day detained individuals are treated as criminals from the start, completely subverting their presumption of innocence and constitutional rights. A bail fee, set by a judge, is intended to be determined by the severity of the crime and set at an affordable balance. Nowadays, individuals are vulnerable to judges making decisions based on personal discretion and prejudice, allowing for an under-the-radar abuse of power. Instead of the severity of the crime determining your bail, a judge can make a decision based on an uncontrollable factor such as race, if they label the accused as a flight risk without actually making any reasonable judgments based on a criminal record or a biased interpretation of the defendant as a person. Prejudiced judges can lead one to believe traits or certain groups make them dangerous and a flight risk, making it more likely for them to set a high cash bail. As a result, detainees are treated as criminals and often have their constitutional rights violated.

Systemic prejudice within the bail process slowly destroys public trust in the judicial system, amplifying racial and socioeconomic disparities. By favoring cash bail, the system perpetuates an unjust cycle where those who cannot pay remain incarcerated, effectively punishing poverty. This punishment is embedded in a system that prioritizes financial security over the fundamentals of a fair and due process. Aside from the common misconception that cash bails are "justly" set and contribute to reducing crime by providing an incentive against committing crimes and keeping those considered "dangerous" in pretrial detention, it also comes with apparent profitability for bail bondsmen and courts. Since a primary cash bail system allows for the most profit for bail bondsmen and the court system, it is no surprise that the United States heavily relies on it. Bail companies have been found to frequently exploit legal and procedural loopholes to avoid paying forfeited bail bonds, even when defendants fail to appear in court (Sharma, 1980), which adds to the systemic dysfunction and design flaws in our current commercial bail system that intentionally exploits the most vulnerable.

Systemic Bias in the Bail System: Wealth, Race and Injustice

A judge's discretion and potential bias in setting bail amounts are the most obvious form of discrimination against people of color; despite being less likely to afford it, Black and Latinx defendants face significantly higher bail

amounts, often double those of white defendants (Sawyer, 2019). Racial disparities in the bail system are deeply enriched in systemic racism analyzed through the lens of Critical Race Theory (Bell, 1995). Critical Race Theory explains how legal systems historically and currently serve to uphold racial hierarchies, which can be seen in how defendants of color face these significantly higher bail amounts. An increasing use of community bail funds highlights a disproportionate impact of money bail on people of color, especially those of low income (Simonson, 2017). On average, bail in the United States is \$10,000, equivalent to eight months of income for an average detained defendant (Rabuy & Kopf, 2016). Those in a higher economic class can find this amount to be manageable, allowing them to pay the fee and enjoy their freedom while awaiting a court date. Individuals from lower economic classes are left in challenging positions. For those who cannot afford to pay the full cash bail, there is something called a surety; in return for your release, you pay a 10% fee to a bail bond agent or agency (Rabuy & Kopf, 2016). While 10% may not seem like much, 10% of \$10,000 is still \$1,000; if defendants are of the lower economic class and can scrape together savings to pay this amount, they can be released. The catch is that no matter if the defendant shows up to your court date, the fee will not be returned to you. Those who cannot afford either option remain detained in local jails, losing jobs, housing, and family stability over an inability to pay. Collateral requirements allow bail bond companies to exploit systemic vulnerabilities by shifting financial risk onto defendants and their families (Sawyer, 2022).

This financial divide actively reinforces systemic inequities. People of color, who are already disproportionately impacted by over-policing and lower median incomes, are put at a more significant disadvantage (Donnelly & Macdonald, 2018). Black men, for example, have a pre-incarceration median income that is 64% lower than their non-incarcerated counterparts, and Black women often live below the poverty line prior to incarceration (Rabuy & Kopf, 2016). As a result, poverty and racial disparities feed into each other and create an unbreakable cycle of mass incarceration of marginalized groups. Disparities perpetuated by the bail system extend to pretrial detention; individuals held on pretrial are more likely to plead guilty, regardless of innocence, to regain their freedom. This process increases the likelihood of conviction and often results in harsher sentences, further solidifying the connection between cash bail, racial injustice, and mass incarceration. These systemic failures, as a whole,

undermine the presumption of innocence and highlight the use of the cash bail system as a regulator of oppression and a tool of social stratification.

Punished Before Trial: Pretrial Detention as a Sentence Without Conviction

Even after enduring racial disparities and the unfair presumption of rights based on economic class, pretrial detention presents an entirely different level of injustice. Pretrial detention is the arrest of an individual awaiting trial; in the same way, bail frees someone until their court date and pretrial detention detains someone until their assigned court date (Sawyer, 2022). Unfortunately, court dates are typically delayed numerous times and can extend the detention of an innocent individual who cannot afford bail. High and unjustly set cash bail amounts are a modernized denial of fundamental rights, including access to fair representation and a speedy trial.

When one cannot afford bail due to their economic situation, they are likely unable to afford proper representation; without pretrial release, the defendant is not allowed proper time and access to adequate representation (Sawyer, 2022). In pretrial detention, connections to the outside world are minimal, and defendants are left without a way to build their case and speed up the process. They have the least control over their circumstances when their livelihood and future are on the line. The only person with some control in building their case is an assigned public defender, who is overworked and underpaid and does not adequately represent their many cases. Research shows that sentencing disparities are partly due to resource gaps, leading to Black defendants being less likely to access high-quality representation and more likely to receive harsher sentences (Land & Spitzer, 2020).

Pretrial detention is not just about the lost time; it is about the conditions people are forced to endure while doing so. Over time, a reliance on pretrial detention has been a leading cause of jail population growth in the United States. As the number of incarcerated individuals increases, so does the backlog of cases, leaving many waiting months or even years before their court dates. Individuals who are trapped in pretrial detention due to not being able to afford bail are treated as criminals under the custody of jails. The effects of this unjust treatment are profound; mental health, personal relationships, and even employment positions are destroyed while a presumably innocent individual is unjustly incarcerated. For those trapped in pretrial detention, facing postponed

court dates and without access to proper legal representation, the system leaves them with the uninviting option of accepting a plea deal to escape the confines of incarceration.

Plea Bargaining: A System of "Choice"

Plea bargaining is a process by which a criminal defendant is offered a lighter sentence in exchange for waiving their constitutional right to a jury trial in which they can receive a harsher sentence if convicted (Rabuy & Kopf, 2016). For a detained individual, a plea deal often presents as the lesser of two evils. The options are limited, risk going to trial where the odds are stacked against the defendant, and a harsher sentence looms if convicted, or accept the plea deal, admitting guilt in exchange for a reduced sentence. This decision is rarely made freely or fairly, especially when the initial trigger is an unjustly high bail amount that a person cannot afford, it instead reflects the inequities of a system where wealth determines freedom. Months or years of incarceration while awaiting trial can break a person down, both mentally and physically. When prosecutors add the threat of harsher penalties to the already unbearable conditions of pretrial detention, the so-called "choice" becomes less about justice and more about survival. With a plea deal comes freedom, either immediately if time was already served pretrial or eventually after the sentence is complete; but with it comes a criminal record that cannot be erased and a mark that makes life after incarceration even harder.

In terms of bail, high bail ensures that only the wealthiest can afford their release, which leaves defendants from low-income communities to rot away in jail. For many detainees, the harsh environment, separation from their loved ones, and prolonged pretrial detention become unbearable. Although plea deals are unfair, they offer freedom immediately if the sentence has already been served or after the agreed-upon sentence is served. However, the "freedom" comes at a price: a criminal record that follows them for life, creating barriers to employment, housing, and reintegration into society.

Early decisions affecting excessive bail and pretrial detention disproportionately impact Black and low-income individuals while amplifying existing disparities throughout the criminal justice process. With over 80% of criminal defendants assigned bail and nearly a third detained pretrial (Donnelly & Macdonald, 2018), the pressure to accept plea deals becomes a reflection of systemic inequality. The disproportionate targeting of marginalized groups perpetuates a cycle where wealth and privilege determine opportunity. For the innocent, the decision to accept a plea deal does not feel like much of a choice when the options are to endure the devastating conditions of incarceration or admit guilt to escape. This practice undermines the principle of presumed innocence. It perpetuates injustice by creating a system where admitting to crimes, whether committed or not, is seen as the only viable path to freedom.

Rethinking Bail: A Call for Reform

Systemic inequality is deeply embedded in the fabric of our criminal justice system, and the bail system is no exception. What began as a measure to uphold the presumption of innocence, provide affordability, and ensure fair representation has evolved into a system that disproportionately punishes marginalized groups. Today, race and economic class often determine whether someone can secure their release or face pretrial detention, which can derail their lives irreparably. The process is relatively simple for those who can afford bail: pay the fee, be released, await trial, and attend your court date to receive a refund. For racial minorities and those from low-income backgrounds, the road is far harsher.

Addressing these inequities requires prominent reform. An example of possible reform is eliminating pay-to-stay programs disproportionately affecting low-income detainees (Rabuy & Kopf, 2016). Doing so could eliminate the practice of jailing people for unpaid fines and abolish cash bail altogether. Eliminating cash bail may result in more released individuals returning for court dates. With their freedom valued by being provided access to the proper resources to prepare their case, one can feel more confident returning to fight their case. Cash bail is not necessary to ensure compliance and demonstrate alternative systems' potential to promote fairness and public safety.

Organizations like The Bail Project have also stepped in to support those burdened by this system. By providing free bail assistance to low-income individuals, The Bail Project has helped thousands secure their freedom, with 90% of their clients returning to court as required (*The Bail Project*, 2024). This underlines the idea that people's ability to attend court is not tied to their financial status but rather to their access to support and resources; this also highlights the transformative potential of a non-cash bail system. With expanded trials and adequate resources, we could build a system that aligns with the fairness, safety, and justice the original bail system intended to provide.

Jurisdictions like Illinois and Massachusetts demonstrate that this is achievable by adopting refundable cash deposits as alternatives to commercial bail bonds (Rabuy & Kopf, 2016). These systems reduce reliance on private bail bond agents, ensuring public safety without perpetuating systemic exploitation. Similarly, Kentucky and D.C. have implemented systems that rely on risk assessment tools instead of money bail, allowing most defendants to be released on their recognizance (Rabuy & Kopf, 2016). These methods help alleviate jail overcrowding and provide a more humane and practical approach to pretrial justice. Community bail funds further exemplify innovative solutions by challenging systemic biases and empowering ordinary citizens to post bail on behalf of strangers (Simonson, 2017). This act of "bail nullification" disrupts the traditional power dynamics of the justice system, shifting influence from state actors to local communities and giving a voice to those historically excluded from the decision-making process.

A reformed and fair bail system is a tangible reality. By eliminating cash bail, expanding risk-based assessments, and supporting initiatives like community bail funds, we can dismantle the discriminatory structures of the current system. The elimination of a cash bail system is a policy change necessary to move in the direction of dismantling systemic oppression. With the right resources and collective commitment as voters and advocates, we can push to create a justice system that values equality over wealth and freedom over profit so that freedom may be determined by the principles of fairness and not financial status.

References

- Bell, D. A. (1995). WHO'S AFRAID OF CRITICAL RACE THEORY? University of Illinois Law Review, 1995(4), 893-910.
- Donnelly, E. A., & Macdonald, J. M. (2018). THE DOWNSTREAM EFFECTS OF BAIL AND PRETRIAL DETENTION ON RACIAL DISPARITIES IN INCARCERATION. *The*
- Journal of Criminal Law and Criminology, 108(4), 775–814. https://www.jstor.org/stable/48572971
- Lang, K., & Spitzer, A. K. (2020). Race Discrimination: An Economic Perspective. *The Journal of Economic Perspectives*, 34(2), 68–89. https://www.jstor.org/stable/26913185
- Rabuy, B., & Kopf, D. (2016, May 10). Detaining the Poor: How money bail perpetuates an endless cycle of poverty and jail time. Prison Policy Initiative. https://www.prisonpolicy.org/reports/incomejails.html
- Sawyer, W. (2022, October). All Profit, No Risk: How the bail industry exploits the legal system.
- Prison Policy Initiative. https://www.prisonpolicy.org/reports/bail.html
- Sharma, S. K. (1980). DIMENSIONS OF JUDICIAL DISCRETION IN BAIL MATTERS. Journal of the Indian Law Institute, 22(3), 351–370. https://www.jstor.org/stable/43950699
- Simonson, J. (2017). BAIL NULLIFICATION. *Michigan Law Review*, *115*(5), 585–638. https://www.jstor.org/stable/44984891
- The Bail Project. (2024, December 6). *The Bail Project Freedom should be free*. https://bailproject.org/