

SHELBY
JUSTICE



THE FUTURE OF BAIL REFORM



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**At the start of the pandemic,
Memphis' inhumane jail conditions became impossible to ignore.
The ACLU of Tennessee brought together
local leaders to tackle the problem where it starts:
the county bail system. BY JAY A. FERNANDEZ**

ILLUSTRATIONS BY AARON MARIN

SEVENTY-FOUR PERCENT OF PEOPLE BEING HELD IN CITY AND COUNTY JAILS AROUND THE UNITED STATES HAVE NOT BEEN CONVICTED OF ANY CRIME.

This amounts to approximately 450,000 people detained pretrial at any one time—a number that has nearly quadrupled since the 1980s—often for low-level offenses. For many, these circumstances are merely the result of an inability to afford bail, a punishment that separates people from their families, puts their jobs and health at risk, and drives them further into debt. For-profit lenders and insurance companies perpetuate these harms, preying on low-income communities. And bail amounts vary widely from city to city, depending on the demands and practices of elected judges and prosecutors. Deeply discriminatory, cash bail, or money bail, policies result in a pretrial population that is disproportionately Black, a symptom of systemic racism that is especially acute in the South.

Since 2020, the ACLU of Tennessee and its partners in Memphis have been working to revamp Shelby County's bail system with groundbreaking results. A system in which people were detained on unaffordable bail and without a guaranteed hearing for months—or even years—in overcrowded jails will now be among the most humane, release-promoting systems in the country. The critical outcome is that far fewer people will be incarcerated.

“Bail reform faces a lot of opposition in the South, but this success shows what can be accomplished through steady community building and culture change,” says Ashika Verriest, staff

attorney with the ACLU's Criminal Law Reform Project. “The commitment of the Shelby County leaders to collaborate serves as a model for other counties in the South and nationally.”

NESTLED AGAINST THE Mississippi River in the southwest corner of Tennessee, Shelby County is the largest of the state's 95 counties, with a population of more than 900,000. The county jail houses an average of 2,000 incarcerated people daily, with 56,000 bookings a year. The men's facility, known colloquially as “201” for its location at 201 Poplar Avenue in downtown Memphis, sits inside a monolithic building complex that also houses the courthouse, the district attorney's office, and pretrial services.

Early in the COVID-19 pandemic, the ACLU began litigating across the country to get vulnerable people released from jails. As part of this urgent campaign, in May 2020, the ACLU of Tennessee filed a federal class action lawsuit against the Shelby County Sheriff on behalf of people incarcerated at 201. *Busby v. Bonner* sought emergency action to protect hundreds of medically vulnerable and high-risk people in pretrial detention there. While working on the case, ACLU of Tennessee Legal Director Stella Yarbrough discovered that there were people who had been in pretrial custody for as long as seven

years without a hearing on bonds as high as half a million dollars, even though the median national bond for a felony is \$10,000. People were languishing in jail for months and even years with no means for release.

Russell Leaks, who joined the ACLU's lawsuit, was detained at the Shelby County Jail for months without a trial and lived in a dormitory-style pod with 20 other people sleeping in bunks two feet apart. At the time, Leaks was 65 and suffered from chronic liver disease including hepatitis. He was not able to social distance or visit the medical unit even as other detainees and jail employees tested positive for COVID-19.

Busby finally settled in April 2021. The agreement included continued monitoring of conditions in the jail and the distribution of vaccines and educational materials. Critically, the judge approved an independent monitor to keep track of required changes at the jail. The monitor's report recommended that the jail population be reduced by at least 50 percent, citing bail's discriminatory role in the system. The lawsuit had fully exposed what the community already knew: The jail was full of presumptively innocent, low-income Black and Brown people being denied their most basic needs, including drinking water, showers, phone calls, and clean, safe air—and money bail was the prime driver perpetuating these inhumane conditions and racial disparities.

“As we worked through [litigation], the conditions of the jail, the operation of the jail, the functioning of the Shelby County criminal legal system were all brought into the open,” says Josh Spickler, executive director of Just City, a nonprofit focused on reforming the criminal legal system and co-counsel in *Busby*. “The idea of litigation based on Shelby County's pretrial detention practices just became an obvious next step.”

“When *Busby* settled, it became urgent to identify ways to get people released,” says Yarbrough. “That's when we started having discussions about, how do people [remain] in jail for five years without a conviction? What are the



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—STELLA YARBROUGH, ACLU OF TENNESSEE LEGAL DIRECTOR

systemic pressure points that are leading to that result? We began that investigation: talking to people who work in the system, people who are in custody, people who work on the bail-setting side, and identifying the need there.”

Over the next seven months, the ACLU of Tennessee identified and collaborated with key coalition partners that could collect data, articulate the lived experiences of those in the community most impacted by the bail system, and design a strategy for potential reforms. In addition to Just City, these partners included Stand for Children Tennessee, a nonprofit focused on education equity and youth justice reform, and the Official Black Lives Matter (BLM) Memphis Chapter. Stand for Children was instrumental in coordinating with potential allies and addressing obstacles in the system. BLM illuminated the true impact of the county’s bail practices, providing the ACLU with crucial ground-level perspective on the system’s realities. And Just City, which, like BLM, operates a local bail-relief fund, shared critical institutional knowledge about the inner workings of the system while researching the intricacies of how pre-trial detention decisions are made.

In December 2021, the ACLU, the ACLU of Tennessee, Just City, and the Wharton Law Firm sent a letter to Shelby County officials demanding the county stop its unconstitutional bail practices. “We all saw the upcoming DA election and other elections that were happening that fall [of 2022] as an opportunity to convince the stakeholders to get reform done, so they could run on it and make it a platform in their campaigns,” says Yarbrough.

After some initial discussions, Shelby County officials were finally ready to sit at the table in April 2022. Mayor Lee Harris, Sheriff Floyd Bonner Jr., then District Attorney Amy Weirich, Judge S. Ronald Lucchesi, County Attorney Marlinee Iverson, and various ACLU coalition partners and county representatives all met at 201 Poplar Avenue to begin several months of comprehensive negotiations. At the same time, the ACLU of Tennessee and



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partners engaged in nonpartisan education around the role of prosecutors in the criminal legal system, including county money bail, in advance of local elections that summer. In addition to launching a digital campaign targeting motivated voters, the ACLU of Tennessee published on its website candidates’ positions on money bail and other issues to inform the electorate. Shelby County DA candidate Steve Mulroy, who was co-counsel in the *Busby* lawsuit, made a campaign pledge that he would make money bail a last resort, to be imposed only if other less restrictive conditions are deemed insufficient to ensure that someone appears for their trial. He won the election and began his eight-year term in September. (Mayor Harris was re-elected.)

In late August, the ACLU and its partners announced that a formal agreement

on comprehensive reforms had been reached. The county commission unanimously passed a resolution making the proposed reforms law, and judges signed a standing bail order. The new system will include bail hearings with counsel no later than three days after a person’s arrest, examination of a person’s financial circumstances prior to any decision, and use of money bail only as a last resort. The system also allows judges to continue to make decisions after hearing from both the government and the accused person’s defense counsel. Critically, the agreement includes provisions for data collection and continued monitoring so that the reforms, once implemented, can be studied and adjusted where necessary to achieve their ultimate goal: drastically reducing incarceration rates without sacrificing public safety.

THE BUSBY CASE, along with another ACLU of Tennessee lawsuit challenging police spying on activists in Memphis, and the DA race connected several local issues to make it an opportune moment to achieve bail reform in Shelby County. All strengthened the collective power of the community coalition the ACLU of Tennessee brought together to tackle the bail system. Over the past few months, the coalition has been implementing the changes in deeply entrenched systems staffed by people with decades of experience working in a particular model. Everyone from the national ACLU to the Tennessee affiliate and its partners has had a hand in manifesting the new system: drafting the new forms and orders that the commissioners use; training the judges, prosecutors, and public defenders to operate within the new system; ensuring the necessary data-tracking systems are in place; and working alongside local officials to make sure that the system complies with the new rules. The goal is to have all the new procedures in place early this year.

Once the reforms are executed, the new system can be further adjusted based on what data emerges about pretrial release conditions and outcomes broken down by defendants'

race, ethnicity, and type of charge. Then the ACLU will pull together a playbook of best practices for future reform efforts elsewhere. "One of the great things about this agreement is that we have provided for data to be released publicly and directly to us," says Yarbrough. "Once we start getting those first data sets, if we see that we have created a really effective system, then I would love to take that show on the road."

A number of factors point to a potential blueprint for how to achieve similar reforms in other jurisdictions: The *Busby* litigation produced firmly documented independent evidence of dreadful—and illegal—pretrial detention practices that could not be dismissed. And the ACLU of Tennessee had a solid track record of following through on litigation threats. ACLU Criminal Law Reform Project Staff Attorney Andrea Woods, who is a nationwide bail expert specializing in pretrial detention and was lead attorney on the *Busby* case, has been plugged into Tennessee politics for years. She developed relationships with the key players in Shelby County and brought them together around the common vision of what ideal pretrial justice should look like. The timing of an election year helped since candidates wanted to capitalize on the appetite

for criminal legal reform, and the amenability in the existing political environment meant that the highest levels of county leadership were receptive in a way that previous administrations may not have been. Just City and Stand for Children had nurtured these relationships for years, building legitimacy and aiding negotiations.

"My big takeaway from this is that it really benefited us to go slowly and thoughtfully, to think about who our partners could be, and engage with local stakeholders to end up with a negotiated agreement that allows for true buy-in from both sides," says Yarbrough, who previously served as an assistant public defender in the Davidson County Public Defender's Office in Nashville. "That has made all the difference. We were able to craft a very nuanced, specific, detailed system together."

The reasons to reform and reduce the money bail system are many. It's morally just. It keeps people connected to and productive in their communities, their jobs, and their families. With fewer people in them, it costs much less taxpayer money to run jails. And above all, money bail exacerbates a system that preys on people of color and low-income communities.

"These are lives we're talking about," says Just City's Spickler. "When the people of this community are living and struggling against poverty, we use that as a reason to hold them in detention. That has no business in a modern community that wants to succeed and prosper." ■

ADVANCING JUSTICE IN THE SOUTH

The ACLU's Southern Collective, 12 state affiliates working together to strengthen civil rights and civil liberties in the South, has achieved a number of recent victories for criminal legal reform. In June, after a year of pressure from the ACLU of Louisiana, the U.S. Department of Justice announced it was launching an investigation of civil rights violations by the Louisiana State Police, including excessive force and racial violence against Black and Brown people. The Louisiana affiliate's Justice Lab, an initiative aimed at ending racist policing, has filed more than 40 lawsuits against 25 police departments around the state.

Also in June, a federal appeals court unanimously denied qualified immunity to Virginia corrections officials in a class action lawsuit filed by the ACLU of

Virginia. The Virginia affiliate also began statewide public screenings of its documentary *InJustice: Hidden Crisis in Virginia's Prisons* in the fall.

In August, the ACLU of Mississippi launched its Voting Rights Restoration Project to help the more than 230,000 Mississippians who have lost their right to vote because of a past felony conviction. And the ACLU of Florida created the Florida Immigrant Detention Database to identify patterns of abuse and neglect in the state's immigrant detention centers; as of November, more than 300 complaints had been filed.

To learn more about the work of the Southern Collective, visit aclu.org/southerncollective.