

The U.S. bail system is a racist, profitable machine that preys on people of color. Now, in a pandemic, it's a driver of a public health crisis.





# Criminal Conditions

by JAY A. FERNANDEZ







about public health—is to get people out of jails and prisons right now before they die.”

Almost 40 percent of those incarcerated have at least one chronic health condition, while mass detention and extreme sentencing have created an aging prison population—the population over age 55 has tripled in the past 20 years to nearly 200,000. In jails, most people sleep in dormitory-style bunk beds and have to fight for soap in communal bathrooms, so spreading the infection is inevitable. The arrest and detainment of thousands of protesters in recent months has only increased the severity of the situation.

In late April, the ACLU released a model built in collaboration with epidemiologists and statisticians that determined that nearly 100,000 more COVID-19 deaths will occur in jails than the government estimates unless radical action is taken. In the United States, jails see approximately 10.7 million admissions a year—one every three seconds—with an average stay of 25 days. On any given day, 700,000 people are detained there, and turnover is high.

“With people cycling in and out of jail all day throughout the country, each person becomes a vector for the potential spread of the pandemic,” says Ofer. “You’re exposing that individual to incredible health risks, you’re exposing their families, and you’re

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exposing the broader community. *No one* should be in jail because of inability to afford cash bail. That was true before COVID-19 and it’s even more true after COVID-19. Because that pretrial detention could essentially become a death sentence.”

**The cash bail system** is the fuel that keeps the engine of mass incarceration running in overdrive. Bail has a simple intent: It is collateral to guarantee an arrested person’s appearance at future hearings. But in practice, it targets the poor by encouraging invested parties to increase arrests and assign higher bail amounts, which drive up incarceration rates, underline racial inequities, and perpetuate poverty.

Here’s how it works: After an arrest, most people are required to pay an amount of money in order to maintain their freedom until they’ve fulfilled all court obligations. If the individual shows up to future court dates as required, the bail money is returned; if not, it may be forfeited. If someone can’t pay bail, they are detained until their required appearance. In many jurisdictions, judges have the discretion to lower or waive bail, trusting that the individual will return as expected, but this practice varies widely from state to state and in some counties is never used.

The private bail-bonds industry preys on these circumstances. If an arrested person can’t afford the court’s bail amount, they or their family can pay a bail-bonds company typically 10 percent to 15 percent of the bail fee in exchange for that company taking on the full obligation to the court. But this bond premium is nonrefundable, and often bail-bonds companies will charge interest on installment plans or hold assets as collateral, which ensures that the individual suffers financially even if the original charge is dismissed. The industry, which includes more than 25,000 bail-bonds companies and the handful of global insurance outfits that underwrite them, earns close to \$2 billion in profit annually.

Both court-assigned bail amounts and bail premiums are applied unevenly across race—studies have shown that Black and Latino men are on average assigned substantively higher amounts than white men for similar crimes—and those who cannot afford either land in jail. Trapped there, they are subject to a system that perpetuates negative outcomes: Defendants are four times more likely to be sentenced to prison if they spend their pretrial time in jail; they are more likely to take guilty plea deals for lesser charges to obtain release, even if they are innocent; they suffer the psychological trauma of being cut off from family and friends for weeks, months, or even years; they are exposed to violence, abuse, and poor health conditions; and they risk losing homes, jobs, and custody of their children.

For many already living in poverty, they are presented with terrible choices. The cash bail system drives everyone down the economic ladder, which is why there is often bipartisan support for criminal law reform that decreases incarceration rates and the financial waste of maintaining them.

**Because reforming,** diminishing, or eliminating the cash bail system would have a dramatic impact on incarceration rates and make things more racially equitable, the ACLU has focused much of its litigation and advocacy there. One potential precedent-setting case involves the Nashville Community Bail Fund (NCBF), a nonprofit organization that pulls from a pool of donated money to pay bail on behalf of low-income people to secure their release. Local for-profit bail bondsmen lobbied Nashville judges to institute a rule that allows the court to extract money posted as cash bail to pay future fines and fees, which taxes money posted by anyone on another's behalf and depletes the NCBF's resources. The ACLU sued on behalf of the NCBF to establish that the purpose of bail is not to generate revenue for the government and that criminalizing poverty by garnishing cash bail is unconstitutional.

In March, the Nashville district court granted a preliminary injunction in favor of the NCBF, and a future favorable ruling may encourage other nonprofit bail-fund organizations to grow, easing the

says Andrea Woods, a staff attorney on the ACLU's Criminal Law Reform Project who is lead counsel in both the Nashville and Montana cases. "We're still litigating that case, but we've survived a lot of difficult stages, and no other case in the country has done that."

After studying bail determinations in all 67 Pennsylvania counties over a two-year period, the ACLU of Pennsylvania released a report in May that shows how cash bail is being imposed excessively and how its misuse disproportionately impacts communities of color. The affiliate has taken a multipronged approach to the problem: educating district judges, advocating alongside community partners such as the Philadelphia Community Bail Fund and the Youth Art & Self-Empowerment Project, and litigating on behalf of those incarcerated for their inability to afford cash bail. The ACLU of Pennsylvania filed a lawsuit last year that demands an end to illegal bail-setting practices in Philadelphia and includes recommendations made jointly with the DA's office and the public defenders' office for how to improve the city's bail-setting system. That case is pending before the Pennsylvania Supreme Court.

"Given the agreement from all of the stakeholders, we think it's likely that the Supreme Court would order those recommendations implemented," says Hayden Nelson-Major, Independence Foundation fellow at the ACLU of Pennsylvania. "We see that as potentially setting up a model for change that we can then bring to the other 66 counties."

"The ultimate goal is to end pretrial detention, to ensure that prior to someone having their day in court they never sit in a jail cell, for any reason," says Woods. "The [other] goal is to end wealth-based pretrial detention, which is what cash bail perpetuates. So we're trying to support the actors who are reducing harm and moving toward that world, and we're trying to fight bad actors tying us to the status quo to protect their bottom line."

**Securing the release** of large numbers of people is an essential first step, but how we treat those re-entering their communities is no less important, especially in terms of containing the spread of the virus. While the health crisis in jails and prisons is devastating, the economic damage to vulnerable communities is even more far-reaching. COVID-19 has further laid bare the injustice of a system that compounds the punishment of those already hit hardest.

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burden on friends and family members striving to pay bail for detained loved ones.

In another case, in Montana, the ACLU is suing on behalf of a Missoula family that was terrorized at home by six armed bounty hunters sent by a bail bondsman because the husband, who'd been arrested on a charge of driving with a suspended license, mistakenly went to the wrong courthouse on his assigned hearing date. The amount in dispute with the commercial bondsman was \$115. For the first time, the ACLU is suing all the players that thrive in the cash bail ecosystem—the bounty hunters, the bail bondsman, and the backing insurance company.

"The case has the potential to radically alter what accountability looks like for the for-profit bail industry, which makes millions of dollars off incarcerated people and their families, generates profits for large insurance companies that bear no risk, and subjects people to intrusive and often violent conditions,"





# Advocating Decarceration

Good hygiene and social distancing are nearly impossible in jails, prisons, and detention centers, making them deadly vectors for the spread of COVID-19. To meet this urgency and protect vulnerable populations, the ACLU and local advocates have been pressuring state actors across the country, including governors, judges, prosecutors, and police, to reduce incarceration in two significant ways: by dramatically decreasing the number of arrests and ending cash bail practices.

**BY THE END** of May, ACLU advocacy efforts had helped result in more than 23 executive actions in 15 states and led to the release of more than 35,000 people from jails and prisons (or kept them from entering the system in the first place).

**POLICE MAKE** more than 10 million arrests a year, most of which lead to jail, even though only 5 percent are for offenses that the FBI categorizes as violent. Curtailing arrests and halting prosecutorial practices of requesting cash bail would cause an immediate drop in jail populations by hundreds of thousands of people.

**TO SUPPORT** your state's efforts toward rapid decarceration and an end to cash bail practices that funnel tens of thousands of people into an unjust system, volunteer for the ACLU's Smart Justice Campaign.

Visit [aclu.org/smartjustice](https://www.aclu.org/smartjustice).

In April, the ACLU released a report, *Reentry in the COVID-19 Era*, that addresses the multitude of problems associated with formerly incarcerated people returning to mostly Black and Brown communities that are highly susceptible to the spread of the virus, because of inequities in health care systems. These communities are made up of essential workers with inadequate access to testing and an inability to work remotely. And with unemployment skyrocketing as a result of the economic downturn, even fewer will be able to afford bail or secure solid income, which threatens to swell jail populations anew.

“Detention of any length has profound impacts on people’s families and their ability to pick up when they’re released, and trying to do that in the context of massive unemployment is impossible, especially for those communities that were already struggling to access the resources and opportunities they deserve,” says Nelson-Major.

Together, the recent surge of protests in support of racial justice and the persistent advance of the pandemic have accelerated the movements for bail reform and decarceration. Pre-coronavirus, incarceration rates in the United States had already fallen close to 15 percent over the last several years, but recent shifts in prosecutorial practices, cash bail policies, and policing procedures have led to sharp reductions in jail populations (see sidebar). In Colorado, where in 2019 the ACLU pushed through an end to cash bail for low-level offenses, the county jail population has dropped 42 percent since COVID-19, the equivalent of 5,600 fewer people. Kentucky has seen a 28 percent reduction, or about 3,200 people. Both Los Angeles and San Francisco have seen substantive drops as well.

“In some ways, the pandemic demonstrates to stakeholders that not only is decarceration possible, it’s actually safer,” says Nelson-Major. “And that it’s not only possible, but possible quickly. The pandemic has brought some moral clarity to just how important decarceration is and how the misuse of cash bail has always been a matter of life and death for poor people and communities of color.”

“What we’re working for is to make sure that this is a permanent change in the way Americans view the problem of mass incarceration,” says Ofer. “In many ways, this is bringing renewed attention to the [problem] and to the impact it has on people’s lives, their families, and communities. So, if we do our job right, two to three years from now, everyone will look back at the ferocity of this moment as the tipping point in the fight to end mass incarceration in America.” ■

