

Guilty Until Proven Innocent: The Problem with Money Bail

Francesca Forrest

Pretrial incarceration is expensive for society and can destroy lives, but there are safe, humane, cost-effective alternatives.

The principle of innocent until proven guilty is at the heart of our justice system, and yet in the United States today, 61 percent of people in jails have not been convicted.¹ Although their innocence or guilt has not yet been established, men and women may spend months or even years behind bars awaiting trial—at a cost to the nation of \$9 billion annually.² Furthermore, three-fourths of these individuals are charged with nonviolent crimes, including minor drug offenses.³ Some may not be eligible for pretrial release (parole violators, for instance). But often they are imprisoned because they are unable to pay even the comparatively modest sums set as bail for crimes such as drug possession.

What It Means for the Poor

The bail system affects the poor disproportionately: people trying to cobble together a living from several part-time, minimum-wage jobs may be unable to come up with even \$200 bail to secure release, whereas the more well-off, accused of a more serious crime, may go free because they can afford to pay their bail. (In Massachusetts, the case of Jared Remy, is illustrative. The son of sports broadcaster Jerry Remy, he was repeatedly arrested for assault and easily paid bail whenever it was set. Eventually he pled guilty to murdering a former girlfriend.⁴)

The legal outcomes for those who await trial behind bars are much worse than the outcomes for those who don't. Using data from Kentucky, one study found that, controlling for factors such as prior criminal history or current charge, pretrial detainees are four times more likely to be sentenced to jail and three times more likely to be sentenced to prison—and their sentences are longer.⁵

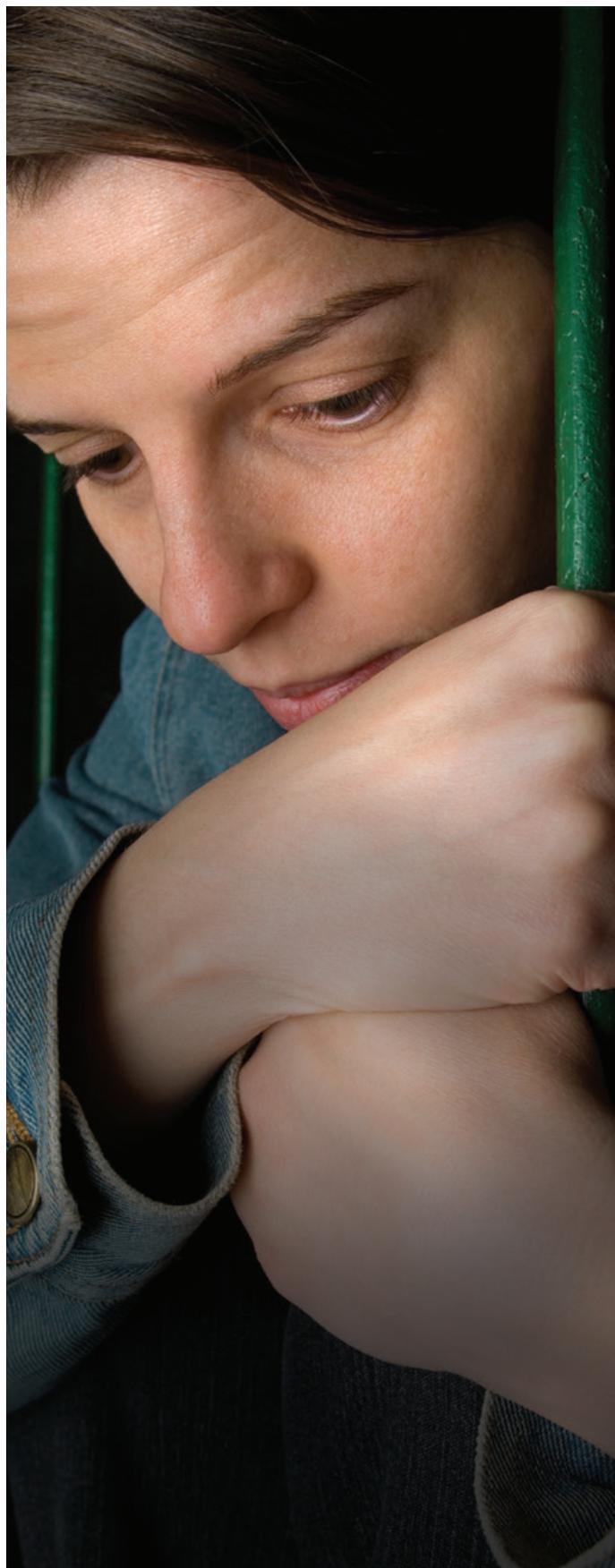


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Those who are found not guilty, meanwhile, may discover that their pretrial incarceration has cost them their job, their apartment, and even custody of their children. The Wellesley Center for Women reported that in 2012 in Massachusetts, 5,300 children were affected by their mothers' pretrial detentions in the Framingham women's prison. Over the course of a year, thousands more women are held pretrial in county jails, and like those in Framingham, the majority are charged with nonviolent offenses.⁶

"When women are incarcerated, whether in MCI-Framingham or in another facility, their children become collateral captives shuffled among relatives or foster care situations. These children in turn are at elevated risks of abuse, high levels of use of [prescribed] psychiatric medication, and ultimately involvement in the juvenile correctional system," reports Susan Sered, a professor of sociology at Suffolk University.⁷ The cost to the commonwealth is high, too. A woman held in jail for two months because she is unable to meet bail costs Massachusetts taxpayers a minimum of \$7,000, according to the Massachusetts Pretrial Working Group.⁸ (In 2012, the average length of pretrial detention in MCI-Framingham was 77 days. The average length of pretrial detention in the Women's Correctional Center in Chicopee, Massachusetts, for that year was 60 days.⁹)

Alternatives

Alternatives exist. Maine saves millions of dollars annually by working with Maine Pretrial Services, a nonprofit organization that assesses the risk of a charged person failing to appear for a court date. People who pass the assessment are released pending their court date and are supervised by Pretrial Services caseworkers.

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The assessment considers factors such as past criminal history, mental health, presence or absence of substance abuse, employment history, and prior history of failing to appear. As a result of the work of Pretrial Services, Maine's jails are less crowded, saving the state money. In 2013, Capt. Marsha Alexander, Kennebec County jail administrator, estimated the savings from having fewer pris-

Proposed Legislation in Massachusetts

Tom Sannicandro

MASSACHUSETTS HOUSE OF REPRESENTATIVES

As of this writing, Senator Ken Donnelly and I have filed legislation to reform the pretrial and bail system by shifting from a wealth-based to a risk-based system. HD3156/SD1491 creates a uniform bail process that will keep pretrial detention from being based solely on a person's inability to pay cash bail.

The bill has four main features:

- it requires the judicial officer to consult a risk-assessment tool designed to predict the likelihood of a defendant returning to court;
- it creates a Pretrial Services Division that would prepare the risk assessment for each defendant and be responsible for any necessary supervision of pretrial defendants;
- it sets a statutory preference against cash bail, encouraging release and use of other evidence-based conditions and access to services that are more reliable than cash bail in ensuring a defendant's presence at court; and
- it initiates bail data collection and analysis.

oners at approximately \$2 million. The county pays \$130,000 for Maine Pretrial Services assistance.¹⁰ Not all counties in Maine make use of the nonprofit, however, and advocates would like to see its role expanded.

The District of Columbia's pretrial program, run by the Pretrial Services Agency, reports impressive statistics. About 85 percent of all those arrested are released prior to their court date, approximately 88 percent of those released return to court, and less than 1 percent are rearrested for a violent crime. "Most significantly, and unique in the entire nation, the District accomplishes this without using money bonds. Money bonds that detain people are illegal in Washington, DC," says Clifford Keenan, the agency's director.¹¹

Not only does pretrial release save the government money and improve outcomes for people accused of crimes, it is also associated with a reduction in crime. Kentucky, another state with a pretrial release program, reported a 4 percent drop in the crime rate at the same time the number of people released into supervision pretrial increased.

The Pretrial Working Group would like to bring those benefits to Massachusetts. The organization is focused on developing and implementing pretrial services throughout the commonwealth and raising awareness about the need to invest in alternatives to incarceration. Lois Ahrens, a cofounder of the Pretrial Working Group and founder of the Real Cost of Prisons Project, says, "Steps to see these significant changes realized include educating legislators,

judges, prosecutors and defense attorneys, and the public about proven alternatives to bail already in use around the country, and urging support for the recently introduced bail-reform legislation.

“We believe the state has the responsibility to ensure that the amount of money a person has does not affect the kind of justice they receive. Rather than investing in new jails to incarcerate people who cannot make bail, we need to invest in pretrial services and community-based, community-run wellness alternatives, which are much less costly in terms of dollars and lessen the damage to men and women who needlessly spend months or even more in jail.” (See “Proposed Legislation in Massachusetts.”)

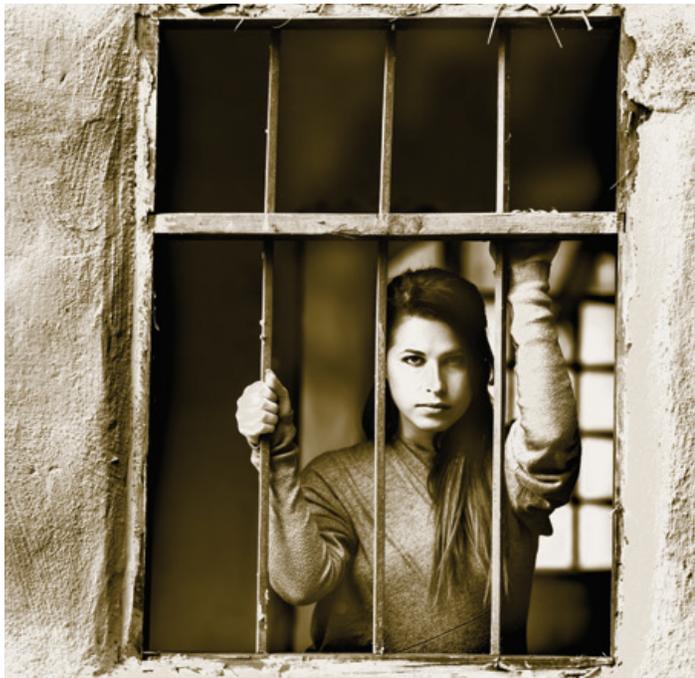


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JusticeHome is an example of the type of program the Pretrial Working Group supports. Proposed by Families for Justice as Healing, a Pretrial Working Group partner, JusticeHome would allow pretrial women to remain in their homes, receiving services such as drug treatment or mental health services, prior to their court date.¹²

Until such alternatives become a reality, another Pretrial Working Group partner may be able to help. The Massachusetts Bail Fund endeavors to post bail for people who are unable to do so, and its volunteers help defendants get addiction treatment and other services in the community after release.¹³

Requiring money bail has been shown to be ineffective as crime prevention, inequitable, and expensive to society. Replacing it with conditional pretrial release would allow many more people to continue working, paying rent, and taking care of their families. Properly implemented, it poses no increased risk to the community and saves money for the state. Perhaps most important, it helps to restore the principle of innocent until proven guilty.

Francesca Forrest, a freelance writer, is a volunteer writing tutor at a Massachusetts women's correctional facility. Contact her at forrestfm@gmail.com.

Endnotes

- ¹ Pretrial Justice Institute, “Rational and Transparent Bail Decision Making: Moving from a Cash-Based to a Risk-Based Process” (white paper, March 2012), <http://www.pretrial.org/devsite/download/featured/Rational%20and%20Transparent%20Bail%20Decision%20Making.pdf>.
- ² Laura and John Arnold Foundation, “Pretrial Criminal Justice Research” (research summary, November 2013), http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF-Pretrial-CJ-Research-brief_FNL.pdf.
- ³ Richard Williams, “Bail or Jail,” *State Legislatures Magazine*, May 2012, <http://www.ncsl.org/research/civil-and-criminal-justice/bail-or-jail.aspx>.
- ⁴ Erik Moskowitz, “For Jared Remy, Leniency Was the Rule until One Lethal Night,” *Boston Globe*, March 23, 2014.
- ⁵ Laura and John Arnold Foundation, “Pretrial Criminal Justice Research,” November 2013, http://arnoldfoundation.org/sites/default/files/pdf/LJAF-Pretrial-CJ-Research-brief_FNL.pdf.
- ⁶ Jean Trounstein, “Why Bail Jails Are a Bad Idea,” *Boston Magazine*, February 6, 2014.
- ⁷ Testimony before the Massachusetts Judiciary Committee, April 24, 2014.
- ⁸ This figure is an approximation, as the cost of two months’ incarceration varies from jail to jail. Sources consulted to arrive at the estimate include Massachusetts Department of Corrections Research and Planning Division, *Prison Populations Trends 2012* (Concord, Massachusetts: Massachusetts DOC Research and Planning Division, 2013), <http://www.mass.gov/eopss/docs/doc/research-reports/pop-trends/prisonpopoptrendsfinal-2012.pdf>; and Massachusetts Budget and Policy Center, “Prisons, Probation, and Parole,” <http://www.massbudget.org/browser/subcat.php?id=Prisons%2C+Probation+%26+Parole>.
- ⁹ Erika Kates, “Pretrial Detention and Access to Bail for Women” (briefing note, 2013), <https://www.wcwoonline.org/pdf/ekates/PretrialDetentionAccessToBailForWomen.pdf>.
- ¹⁰ Kaitlyn Schroeder, “Panelists Urged to Rethink Maine’s Bail System,” *Portland Press Herald*, October 4, 2013, http://www.pressherald.com/2013/10/04/maine-urged_to_revamp_bail_system/.
- ¹¹ Clifford Keenan, “We Need More Bail Reform,” September 2013, <http://www.psa.gov/?q=node/390>. Broadly speaking, money bail is cash paid by the defendant or on the defendant’s behalf as insurance against the defendant’s failing to appear for his or her court date.
- ¹² See <http://justiceashealing.org/>.
- ¹³ See <http://www.cjpc.org/BailFund.htm>.

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