



Punished Before Proven Guilty: Michigan must stop keeping people incarcerated only because they cannot afford bail

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In Michigan, it is common practice for courts to require people who have been arrested and are awaiting arraignment or sentencing to put up cash bail before releasing them from jail. This has ostensibly been to ensure that they will show up for required court dates and will not endanger others or commit further crimes prior to their hearings.

Unfortunately, in communities across Michigan, too many of those arrested for nonviolent crimes and who pose no threat to society needlessly stay in jail. Of the people in Michigan in jail on any given day, half are awaiting trial, having not yet been convicted of a crime.¹ While some of those are kept detained because they are ineligible for bail due to a safety or flight risk, many remain incarcerated simply because they do not have the means to put up cash bail—including individuals later found to be innocent of the crime for which they were arrested. This practice disproportionately punishes people of color and those with low incomes, while having no benefit to the communities in which they live.



Representatives of the bail industry defend the current system using language intended to create fear that individuals who are released prior to trial without paying a cash sum will re-offend.² These arguments make no sense and are misleading. Courts generally assess whether an individual is a public safety risk when determining whether he or she should be eligible for pretrial release at all, not when deciding whether the release should be based on personal recognizance or cash bail. A person who is a flight or safety risk will not be less so because of having the money to make bail, and the person who cannot make bail remains in jail not due to being a greater risk than the person who is free on bail, but because of having fewer financial resources.

The Cash Bail System Disproportionately Punishes People with Low Incomes and People of Color

Cash bail does not keep communities safe; it only keeps the less privileged among us in jail. Although individuals across the economic spectrum get arrested, the cash bail system is starkly stacked against arrestees in the lower income levels. Nationally, over 60% of arrested individuals unable to post bail fall within the one-third of society with the lowest incomes, and 80% are in the bottom half.³ A 2015 study found that people unable to post bail had a median annual income of

\$15,109 (in 2015 dollars) prior to their incarceration, which was less than half of the median income for non-incarcerated people of similar ages.⁴ Individuals of means, on the other hand, are much more likely to have the necessary cash bail amount readily available and can thus leave jail quickly without enlisting the help (and subjecting themselves to the expense) of a bail bond company.

Because the application of bail requirements is inconsistent across communities and because bail bond services target individuals with limited incomes and resources, the current bail system also disproportionately affects Black Michigan residents. First, the respective median annual incomes of Black men and women who are unable to make bail are significantly lower than their White and Hispanic counterparts, and Black men and women have significantly higher income gaps than the other racial groups between those who are unable to make bail and those who are not incarcerated.⁵

There are other racial disparities in the cash bail system that are not as easily attributable to income status. A recent literature review of various city and county studies across the nation found that Black and Brown defendants are 10-25% more likely than White defendants to be detained pretrial or to receive financial conditions of release.⁶ Moreover, median bond amounts for Black defendants are often about \$10,000 higher than for White defendants.⁷

Michigan must address, and ultimately put an end to, this bias against its residents with low incomes and few resources and its residents of color.

The Devastating Effects of Bail Requirements on Individuals, Families and Communities

The consequences of having to remain in jail until arraignment or even sentencing due to not having bail money can be devastating to individuals and their families. It can result in the loss of a job, financial hardship due to missing work, disrupted family and social relations, and trauma for family members. It is especially harmful for children who are placed into Child Protective Services custody while their parent remains in jail simply due to inability to post bail.



Extended jail stays prior to trial and conviction—whether due to cash bail unaffordability or a perceived flight or safety risk—are detrimental to mental health as well. Michigan had 172 suicides in its jails between 2000 and 2019.⁸ While there is no state-level data available about the conviction status of those individuals, national data for those years shows that 73-79% of jail inmates who died by suicide were unconvicted at the time of their deaths.⁹

An extended jail stay due to inability to post cash bail has been found to weaken an arrestee's bargaining positions during plea negotiations, leading to a higher likelihood of a guilty plea and ultimately jeopardizing the defendant's chance of a fair outcome.¹⁰ This may be connected to the finding that low-risk defendants who are detained for the entire pretrial period are more likely to be

sentenced to jail or prison when compared to their counterparts who are released at some point before trial or case disposition.¹¹ A study also concluded that individuals who are detained pretrial are more likely to commit future crimes.¹² In other words, cash bail requirements and the inability for some individuals to meet them have the potential to interfere with the cause of justice.

For arrestees who are able to make bail and avoid a jail stay as they await their hearings, the process of paying a high bail amount can result in financial hardship or debt, since they do not get the money returned until after their deposition hearing. If they go through a bail bond company in order to post bail, they only receive 90% of the bail money posted, since such companies generally keep around 10% of the bail total as a non-refundable fee.

Who is opposed to bail reform?

The problem of the excessive use of pretrial incarceration and bail requirements did not happen by itself. Despite political concern going back at least as far as the 1960s about the “war on the poor” created by the cash bail system, the system remains largely in place in most parts of the country.¹³ Nationally, the bail bond industry has been estimated to back around \$14 billion in bail bonds a year, generating revenues estimated at \$1.4 billion.¹⁴ Unsurprisingly, it remains one of the staunchest foes of bail reform, engaging in intensive lobbying on the state and national level against meaningful cash bail reform.

In Michigan and around the country, bail companies and the insurance firms that back them intensely lobby lawmakers to keep the status quo and contribute to their election campaigns. In 2020, for example, one political action committee funded primarily by bail and pawnbroking interests contributed \$25,000 directly to the campaign of a candidate for judge and contributed more than \$20,000 in ads on behalf of a candidate for county prosecutor.¹⁵



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State Task Force Recommendations to End the Overuse of Cash Bail

In 2019, Gov. Whitmer established the Michigan Joint Task Force on Jail and Pretrial Incarceration and gave it the charge of evaluating Michigan’s justice systems and crafting recommendations for statewide policy and budgetary changes.¹⁶ The task force was chaired by the Chief Justice of the Supreme Court and made up of representatives from state departments, legislators from both parties, law enforcement, county elected officials, judges and others.¹⁷

The task force addressed many issues of corrections and incarceration and issued recommendations. As part of its work, it wrote up six recommendations for reform in the area of pretrial incarceration and bail, and there is currently a package of bills in the Legislature that would put those recommendations into law.

New Bills Would Create Much Needed Improvement to Bail System

There is a bipartisan groundswell of support for reforming the way cash bail is set and other aspects of pretrial incarceration, such as limiting the time between an arrest and arraignment or trial. On October 21, 2021, Michigan lawmakers from both parties introduced the following package of bills in the State House of Representatives addressing these issues. Following is a very brief summary of each of the bills (the bill language itself along with other information can be found in the links):

HB 5436	Sets out the standards by which the court can require a defendant to remain incarcerated and/or be released on cash bail, and requires the court to release the defendant without a cash bail requirement if the court determines they don't pose a flight risk or a physical risk to themselves or another person.
HB 5437	Requires the court to: a. conduct an inquiry into a defendant's ability to pay for the condition, considering all of the following circumstances: i. All financial resources available to the defendant within 24 hours from any lawful personal sources. ii. Any debts, financial obligations or dependents. iii. The defendant's basic living expenses, including, but not limited to: food, shelter, clothing, necessary medical expenses or child support. iv. Any other special circumstances that may have bearing on the defendant's ability to pay. AND b. consider whether practical assistance or voluntary supportive services (such as court reminders, service referrals, transportation assistance and voluntary remote check-ins) would be sufficient to address any pretrial risks posed by the defendant.
HB 5438	Requires that except in specific circumstances, the charge against a defendant must be dismissed if the court does not try the defendant and make a final determination of the charge within 18 months after arrest or the issuance of an appearance ticket.
HB 5439	Requires that in most cases, if a magistrate is not available or a person arrested cannot receive an immediate hearing, the person must be released on his or her own recognizance. (A person charged with a serious misdemeanor may be required to deposit an interim bond of 20-50% of the minimum fine for that misdemeanor.)
HB 5440	Provides for adopting a pretrial risk assessment that may be used by courts to determine if a defendant is a flight or safety risk.
HB 5441	Repeals allowing bail for traffic offenses or misdemeanors.
HB 5442	Amends reference to surrendering license as condition of pretrial release.
HB 5443	Modifies setting of bond related to spousal or child support arrearage.

The Michigan Legislature should act quickly to consider and pass these bills, and turn a new leaf in Michigan on behalf of residents who are detained prior to receiving a trial.

End Notes

- 1 *Michigan Joint Task Force on Jail and Pretrial Incarceration: Report and Recommendations*, January 10, 2020.
- 2 Website of the American Bail Coalition (<https://ambailcoalition.org/category/michigan>, accessed on October 14, 2021).
- 3 Rabuy, B. & D. Kopf, *Detaining the Poor*, Prison Policy Initiative, May 2016.
- 4 Rabuy, *ibid*
- 5 Rabuy, *ibid*.
- 6 Sawyer, W., *Briefing: How Race Impacts who is Detained Pretrial*, Prison Policy Initiative, October 9, 2019.
- 7 Sawyer, *ibid*.
- 8 Carson, E. A., *Suicide in Local Jails and State and Federal Prisons, 2000–2019 – Statistical Tables*, Bureau of Justice Statistics, October 2021.
- 9 Carson, *ibid*.
- 10 Dobbie, W., J. Goldin & C. Yang, *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, National Bureau of Economic Research, United States Department of Treasury, August 2017.
- 11 Lowencamp, C., M. VanNostrand & A. Holsinger, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, Arnold Foundation, November 2013.
- 12 Heaton, P., S. Mayson & M. Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, Stanford Law Review, Volume 69, March 2017.
- 13 For example, see President Johnson's remarks at the signing of the Bail Reform Act of 1966. Website of University of California, Santa Barbara's American Presidency Project (<https://www.presidency.ucsb.edu/documents/remarks-the-signing-the-bail-reform-act-1966>, accessed on October 18, 2021).
- 14 American Civil Liberties Union, *Selling Off Our Freedom: How Insurance Corporations Have Taken Over Our Bail System*, May 2017.
- 15 Website of the Secretary of State, Michigan Campaign Finance Searchable Database: "Bail PAC Statement of Organization" (<https://cfrsearch.nictusa.com/committees/519202>, accessed on October 19, 2021).
- 16 The Office of Governor Gretchen Whitmer, Executive Order No. 2019-10 (https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-495399--,00.html, accessed on September 30, 2021).
- 17 Jail and Pretrial Reform page of the website of Michigan Courts (<https://www.courts.michigan.gov/administration/special-initiatives/jail-advisory-council>, accessed on October 8, 2021).