

How Bail Works in Michigan and Recommendations for Reform

By Kahryn Riley

Background

Bail is the process by which criminal defendants secure their release while awaiting trial. It allows people who have been charged with a crime to be released from police custody. Bail can also refer to the sum of money that many defendants are required to provide as collateral for their appearance in court at a later date. Defendants who make good on their promise and appear in court at the appointed time will have their cash returned to them at the conclusion of their trial, but those who fail to appear in court will forfeit it.

Bail is a centuries-old legal practice and a topic the American Founders addressed as they structured the criminal justice system in the U.S. Constitution and Bill of Rights.¹ It was originally developed as a method for coping with the protracted delays between when criminal defendants were apprehended and when trials could be arranged. In the days of itinerant judges who served multiple jurisdictions simultaneously, defendants might have to wait months or even years before a judge was available to hear their case.² Keeping the accused in jail for such an extended period was not practical. Requiring collateral from a criminal suspect helped ensure that he would appear at trial and would provide compensation for the victim of the crime if he absconded.

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The practice operates with similar justification today. The Michigan legal system relies on a money bail process to help ensure that criminal defendants — people who have been formally charged with a crime — appear in court for their trial. Bail is generally available to all criminal defendants except in a few limited circumstances. By obtaining a promise to appear and requiring cash collateral from defendants, the cash bail system aims to create a strong incentive for defendants to make themselves available for trial. Defendants who are released on bail but fail to appear for trial not only forfeit their bail money, but they also become subject to arrest and will be detained in jail for the duration of their trial.*

In recent years, the criminal justice system has drawn criticism from across the political spectrum because cash bail has come to be imposed on so many criminal defendants. Data increasingly indicate that releasing a defendant pretrial has a significant impact on his long-term prospects. It affects the defendant's ability to retain his housing, employment, and child custody, the probability that he will go on to commit another crime and even the likelihood of a favorable legal outcome in his case.³

Research has also revealed that the majority of jail inmates are legally innocent but are being detained because they cannot afford to bail out before and during their trial.[†] This imposes large costs on local

* Individuals may have new bail granted, or the original bail reinstated, depending on the judge's discretion.

† Nationally, about 60 percent of jail inmates are awaiting court action rather than serving time on a conviction. This has been the case since 2005. Todd D. Minton and Zhen Zeng, "Jail Inmates in 2015" (U.S. Department of Justice, Dec. 2016), <https://perma.cc/6LMU-W2UM>.

governments but provides no clear public safety benefit. Finally and most importantly, states with misguided pretrial release policies may infringe on defendants' liberty interests, opening themselves up to litigation and the risk of an injustice. For these reasons, stakeholders and practitioners in Michigan should work to understand the purpose of bail and implement the best pretrial practices for respecting individual rights and public resources.

How Bail Works

The terms “bond” and “bail” are frequently used interchangeably in everyday speech and even in Michigan statute, but they are distinct. The legal definition of bond contemplates a contract promising to pay money or provide some other security, which contains a clause voiding the promise if a certain condition is met.⁴ Bail, by contrast, can either be a verb referring to the process of releasing someone from government custody or a noun that means a sum of money posted to obtain that release.⁵

In general, criminal defendants are entitled to pretrial release except in a few limited cases.⁶ They are usually arraigned before a judge, who decides whether to impose conditions on that release, and then either freed from government custody or detained until they can meet the conditions.⁶

The Michigan Constitution allows bail to be denied to certain defendants when the “proof is evident or the presumption great” that they are guilty.⁷ This may

include defendants charged with murder or treason, felons convicted of two different violent felonies within the last 15 years and anyone charged with committing a crime while they were out on bail, probation or parole. Additionally, judges may deny bail to defendants charged with first-degree criminal sexual conduct, armed robbery or kidnapping with intent to extort money or valuables.[†]

All other defendants must be offered bail, but, under the constitution and state law, bail cannot be excessive.[‡] Additionally, judges may attach certain conditions to the defendant's release on bail, such as travel restrictions, curfews or drug tests.⁸

The Michigan Court Rules contemplate three possibilities concerning the custody of a defendant while he awaits trial: 1) denial of bail, via court order, under which the defendant will be held in custody until and throughout his trial; 2) release on a “personal recognizance” or “unsecured appearance” bond; or 3) conditional release.[§] This conditional release may include the requirement that the defendant provide collateral before going free — usually via a cash or surety bond.^{**}

When a judge denies bail, he must state reasons for that decision on the record.⁹ There are two sets of factors that judges use as guidelines for making pretrial release determinations. One is contained in the Michigan Code of Criminal Procedure and the other is laid out in the Michigan Court Rules.

* The Michigan Constitution states “[a]ll persons shall, before conviction, be bailable by sufficient sureties.” Mich. Const. Art. 1, § 15. Michigan law specifies that “[e]xcept as otherwise provided by law, a person accused of a criminal offense is entitled to bail. MCL § 765.6(1). An exception is “interim bail.” Interim bail is when a court sets a specified bail requirement as part of a warrant, before the accused is arrested or arraigned. This allows law enforcement to collect bail while executing the warrant and release the defendant pretrial. MCR § 6.102(D). Interim bail may also be collected when a magistrate is not immediately available to arraign a misdemeanor defendant. Its purpose is to ensure the defendant appears at his arraignment. MCL § 780.581; MCL § 780.586.

† Mich. Const. 1963 Art. 1, § 15. Denying bail results in the imprisonment of a presumptively innocent person; therefore, courts who deny bail face additional speedy trial requirements to limit the amount of time that an individual remains in jail awaiting trial. Specifically, the trial must commence no later than 90 days after bail has been denied. If the trial does not begin in 90 days, the court must hold a bail hearing and offer bail to the defendant. MCR § 6.106B(3).

‡ Mich. Const. Art. 1 § 16; MCL § 765.6(1). “Excessive” bail is a “figure higher than an amount reasonably calculated to fulfill the purpose of assuring the presence of the defendant” at trial. *Stack v. Boyle*, 342 U.S. 1 (1951).

§ MCR § 6.106(A). If a judge denies bail, the defendant may only be detained for up to 90 days. After that point, his trial must begin or the judge must set bail. MCR § 6.106(B)(3). MCR § 6.106(C) describes release on personal recognizance as a grant of release in exchange for a promise to appear, with no requirement to post bail money.

** The difference between a secured and unsecured bond is that, in the first case, a defendant will be obliged to provide a sum of money (“surety”) prior to his release. Unsecured bonds mean that a defendant does not have to provide money to the court, but the court will determine a sum of money that the defendant will owe if he fails to appear as required during his trial. See MCR § 6.106(A)(2); MCR § 6.106(C).

The Michigan Code of Criminal Procedure is a set of statutes that govern the proceedings in criminal courts and specify defendants' rights and judges' responsibilities. It is binding on judges and directs them to make findings on the record about the seriousness of the offense charged, the protection of the public, the defendant's previous criminal record and "dangerousness" and the probability that he will appear at trial.¹⁰

The Michigan Court Rules are guidelines established by the Michigan Supreme Court that function as internal operating procedures for courts. Similar to the code of criminal procedure, the court rules indicate that judges should consider a variety of "relevant information" about the defendant when determining whether he is safe to be released and likely to appear in court. These include:

- ◆ The defendant's prior criminal record;
- ◆ His record of appearance at previous court proceedings;
- ◆ Any history of substance abuse or addiction;
- ◆ His mental condition and "character and reputation for dangerousness;"
- ◆ The seriousness of the offense charged, probability of conviction and likely sentence;
- ◆ The defendant's employment status and financial history;
- ◆ The availability of responsible community members to vouch for and monitor him;
- ◆ His familial relationships and ties to the community.*

Although the court rules instruct judges to consider these factors, the court need not make findings on the record about each of these factors.

The court rules indicate that, when setting bail, judges should select the least restrictive conditions that they find sufficient to ensure a defendant's appearance at trial. If a defendant is not ordered to be held in

custody, the rules guide judges to order the defendant's release on his personal recognizance, without the need for bail money. In fact, the rules contain a presumption in favor of personal recognizance bonds: "If the defendant is not ordered held in custody ... the court must order the pretrial release of the defendant on personal recognizance, or on an unsecured appearance bond."¹¹ This should, in practice, make them the default.

The judge may believe that releasing a defendant on personal recognizance alone will pose a risk to public safety or will not reasonably ensure his appearance at trial. In that case, the judge may attach additional release conditions, such as curfews, substance abuse testing, enrollment in a treatment program, or remaining in the custody of another person who agrees to monitor the defendant.¹²

If the judge believes that these additional conditions would not be sufficient to reasonably ensure the defendant's appearance at trial, he may require the defendant to post money bail. The court rules state that judges who wish to impose money bail must make an explicit finding that bail is required to assure public safety and/or the defendant's appearance.¹³ Judges may choose which form of bail to impose: 1) a cash deposit or surety bond equal to the full bail amount, or 2) a cash deposit or surety bond equal to part of the bail amount. For partial payment, judges typically require an amount equal to 10 percent of the total for cash bail, or 25 percent of the total for a surety bond.[†]

A defendant who is released on his own recognizance is free until and throughout his trial. Defendants who are required to post bail are detained in jail until they make the required payment to the court or until they find a third party to make the payment on their behalf. The court holds a defendant's bail money until the conclusion of his trial. When the defendant has

* MCR § 6.106(F). Many of these factors may not actually be strong predictors of a risk to society or influence the likelihood of the defendant appearing for trial.

† MCR § 6.106(E). In some cases, judges may also accept a piece of real estate in lieu of cash or surety bonds.

satisfied his appearance requirements, the money used for bail is either returned to him or applied to the cost of penal fines and court fees that may have accumulated as a result of his trial.¹⁴ If the defendant fails to appear, he forfeits the bail money, his pretrial release is rescinded and a warrant is issued for his arrest. If a defendant posted bail or a bond equal to less than the full bail amount and then fails to appear, the court will require him to pay the entire bail amount.*

The state allows defendants to hire a commercial bail bondsman to post bail on their behalf.¹⁵ If a defendant cannot afford his bail, he may pay a nonrefundable fee, not to exceed 10 percent of the bail amount, to a bondsman, who will pay the full bail amount to the court on the defendant's behalf.¹⁶

The bondsman obtains the defendant's release by posting the bail for him, but he also becomes obligated to ensure the defendant makes his court date. If the defendant appears as required, the court returns the bail money to the bondsman. If the defendant fails to appear, the bail money paid by the bondsman is forfeited to the court. Sometimes courts will only require the bondsman to post a portion of the full bail amount. If the defendant fails to appear in this instance, the bondsman will forfeit the portion he posted, and the defendant also becomes personally liable to the court for the remainder.¹⁷

Since they stand to lose their bail money if their clients do not appear in court, bondsmen usually closely monitor defendants until trial. They even pursue defendants who "skip" — that is, flee the jurisdiction — using bounty hunters or "skip tracers." The United States and the Philippines are the only two countries in the world that authorize the use of commercial bail bondsmen and bounty hunters to recover bail skippers.¹⁸ Both state law and U.S. Supreme Court precedent give bounty hunters broad authority to locate, arrest and extradite defendants who skip.¹⁹ If a

bounty hunter fails to recover a bail skipper by the date that he is required to appear for trial, law enforcement may also begin pursuing him.²⁰

Reforms in Other States

There is no standard bail or pretrial process — each state and the federal government handle these decisions differently. In recent years, however, a growing number of states have made changes to their bail systems to try to make release safer for the public and fairer for individual defendants. New changes, such as those embraced by the courts in Arizona, Illinois, Maryland and New Mexico, are designed to minimize the impact of a person's financial standing on decisions regarding their release.²¹

For example, Alaska now automatically affords people charged with most crimes release on personal recognizance.²² Indiana is piloting a new program that uses a risk assessment questionnaire to help judges make more objective decisions about whom they may safely release, with an eye toward wider use of personal recognizance bonds for low-income defendants.²³ Illinois, meanwhile, passed legislation in 2017 allowing defendants who can't afford their bail deposit to have a new hearing on the bail amount.²⁴ The new law also specifically exempts people accused of certain low-level offenses from being required to pay bail. Even Michigan's own 55th Judicial District Court is piloting a new policy that releases most misdemeanor defendants on personal recognizance, which, in its early stages, seems to slightly improve their trial appearance rate.²⁵

New Jersey's recent bail reform has become a particularly popular case study. In 2017, the state overhauled its pretrial detention practices so that the use of money bail has decreased dramatically: In 2017, New Jersey judges only required 44 people to post money bail, of more than 140,000 defendants who faced criminal charges that year.²⁶ Nearly 70

* The above discussion applies to both felony and misdemeanor cases and is drawn from MCR § 6.001(A)-(B); MCR § 6.106(I)(2).

percent of all criminal defendants were charged and then granted pretrial release.²⁷

New Jersey requires judges to use a risk assessment and an accompanying decision-making framework when making pretrial release determinations. The risk assessment tool attempts to quantify a defendant's potential risk to society by assigning a numerical score to various factors, such as criminal history and age, which may be able to predict the probability of failure to appear, or the risk of re-offense while on pretrial release.²⁸ Judges may exercise discretion as to how this information will impact the pretrial release decision, but are encouraged to release defendants with the lowest scores on their own recognizance, impose release conditions on those with middling scores, and deny bail to defendants deemed a high risk by the assessment.²⁹

Although risk assessment tools are a relatively new development and have been subject to criticism, research suggests that these algorithms could be useful.³⁰ New Jersey's new system contributed to a 20 percent decrease in the state's pretrial jail population in 2017.³¹ Opponents of the change predicted that releasing criminal defendants would result in a statewide crime wave, but law enforcement statistics show no such increase in violent crime: Murders, robberies and assaults actually decreased statewide.³² Although challenges with funding the program have materialized, New Jersey's reformed pretrial system is the only one in the U.S. to receive an A grade from the Pretrial Justice Institute.³³

On the other hand, Maryland seems to have experienced negative unintended consequences of the bail reforms it made in July 2017. The state now requires judges to set the "least onerous" restrictions needed to ensure a defendant appears at his trial. Early data from its new system indicate that, while the number of people detained because they couldn't or wouldn't pay bail was halved, the number of people held without bail more than doubled.³⁴ And defendants who were released on personal

recognizance are more likely than before to be fitted with ankle monitors at a cost to themselves that frequently exceeds what cash bail would have cost. Some critics of the reforms argue that the changes have made low-income defendants worse off than they were before. Meanwhile the failure-to-appear rate was up five percentage points between October 2017 and January 2018.³⁵

At least three explanations have been offered to explain the increased bail denials in Maryland. One is that the change prompted judges to be frank: Rather than set a steep bail amount in the hope that a risky defendant won't be able to pay, judges are now more apt to simply eliminate the bail option for those defendants.³⁶ Another is that, since losing the middle option that bail offers between releasing defendants on personal recognizance and detaining them, judges now err on the side of caution and deny bail.³⁷ The third, which may help explain some of the other consequences, such as a higher percentage of defendants failing to appear in court, is that the reforms were implemented prematurely, without a companion pretrial services system that would have helped them work better.³⁸

The success of bail reform in New Jersey has been due in large part to ensuring that judges have some middle ground between release and detention. When neither detention nor release on recognizance is an appropriate option, judges have been able to rely on a third option: pretrial services that supervise the defendant while he is released back into the community.³⁹ As part of these services, case managers connect defendants to treatment and help enforce compliance with other court-ordered treatment. They also help defendants meet employment requirements, housing restrictions and other conditions of release.

If these services are not available or not operating at capacity, judges can be unwilling to release defendants that they perceive as a risk. Criminal defendants are more likely than the general population to be plagued

by addiction, mental illness, joblessness, homelessness and poverty. For this reason, judges can be more likely to err on the side of caution and order detention without bail if there are no services available in the community to help defendants address the issues underlying their criminality and hold them accountable for appearing at trial.

The case studies described in this paper speak to the complexity of the pretrial release system, demonstrating how carefully and comprehensively reforms must be implemented in order to succeed.

The Case for Bail Reform in Michigan

Although the stated goals of Michigan’s bail system are to bolster public safety and ensure that criminal defendants appear in court for their trial, the rules guiding pretrial decisions do not necessarily enable it to meet those goals. The current model is primarily based on a defendant’s ability to pay: Those who can afford bail go free — even, in some cases, if their crime was serious. Those who can’t pay stay in jail, even if their crime was minor and nonviolent.

Moreover, the system is not set up to reasonably predict a defendant’s likelihood of returning for trial. Michigan judges must work with necessarily subjective impressions of defendants, rather than relying on assessments that offer a more objective evaluation of a consistent set of research-backed factors. When low-income, low-risk defendants inevitably end up in jail awaiting trial, taxpayers must foot the bill; in some counties, this cost can exceed \$100 per person per night.⁴⁰

Individuals and organizations representing a variety of different interests have been calling for reforms to the way bail works in Michigan. Gov. Rick Snyder dedicated a portion of his 2015 “special message” on criminal justice issues to call for reforms to pretrial procedures. In the address, he pointed out that 60 percent of jail inmates statewide have not been convicted of a crime but are incarcerated nonetheless,

even though the vast majority of criminal offenses allow for bail.⁴¹ The Michigan State Court Administrative Office, an agency of the Michigan Supreme Court, issued a memo in 2016 urging judges to adhere more closely to court rules directing them to release inmates on personal recognizance if possible and only impose bail when it is truly necessary. Many observers, however, think the memo was ineffective, and so the reform effort has continued to grow.⁴² Michigan Supreme Court Justice Bridget Mary McCormack convened a working group in 2017 to address the shortcomings of cash bail and explore possible reforms.⁴³ The Mackinac Center has also convened a coalition of lawyers, judges, court administrators, local government officials and other stakeholders to study the issue.

This broad reform effort has been driven by new academic findings that turn many current bail assumptions on their heads. For instance, a study by the Pretrial Justice Institute has shown that asking a criminal defendant to promise to return to court for trial is just as effective at securing his appearance as requiring him to provide collateral.⁴⁴ It further found that unsecured bonds are as effective at securing public safety as secured bonds, and that the only correlation with higher bail amounts is higher jail use — not higher trial appearance rates.⁴⁵

Moreover, some research suggests that pretrial detention creates public safety hazards, since there is a link between pretrial detention and post-trial recidivism. Defendants detained pretrial were 1.3 times more likely to commit new crimes after the conclusion of their case than those who were released. Plus, the likelihood of recidivism increases with the duration of the pretrial detention. This suggests that the pretrial practices currently employed in Michigan may actually be counterproductive to the goal of bolstering public safety when defendants are needlessly incarcerated.

Another finding that suggests Michigan’s current bail system needs reform is that defendants who are detained pretrial are more likely to be convicted and more likely to receive harsher sentences than those who obtain pretrial release, all other things being equal. Research from many credible sources — including the New York City Criminal Justice Agency, Princeton University and the John and Laura Arnold Foundation — confirm this correlation.⁴⁶ One study found that “detained defendants are over four times more likely to be sentenced to jail and over three times more likely to be sentenced to prison than defendants who were released at some point pending trial.”⁴⁷ The implications for defendants who are detained merely due to an inability to pay are critical both for their individual outcomes, and, again, for public safety.

In addition to the growing body of research demonstrating problems with many current bail practices, the process of developing reform proposals has brought several issues with Michigan’s pretrial practices to light. Some people have noted a wide disparity between the way different counties and even individual judges within counties handle bail decisions. In West Michigan county jails, for example, the portion of inmates who are held pretrial ranged from 18 to 66 percent in 2017.⁴⁸ This is problematic because it suggests that pretrial release decisions may not be based on objective criteria and that a defendant’s odds of getting bail may depend just as much on his geographic jurisdiction as his actual flight risk or dangerousness.

The cost of housing pretrial defendants varies from county to county. State law authorizes jails to bill inmates up to \$60 per day to recoup this expense, but it can nevertheless still cost local taxpayers significant sums, as noted above.⁴⁹ If it is true that 60 percent of jail inmates statewide are there pretrial, and bail may

only be denied in a small number of cases, then counties must be incarcerating a large number of people who have been offered bail but cannot afford it. In addition to increasing costs to taxpayers, these inmates occupy space that is meant for convicted criminals who have been sentenced to serve time, or pretrial detainees who are either unbailable or pose an unmanageable flight or public safety risk and must be denied bail.

Judges sometimes set very high bail amounts in the expectation that defendants who are accused of bailable offenses will not be able to pay and will be detained until trial.⁵⁰ It’s not clear how often or in what types of cases this tends to happen in Michigan, nor is it known how many defendants who are offered bail are able to pay it. However, judges in one Texas county who were found to be using these “workarounds” to detain bailable defendants faced litigation.⁵⁰ Lawsuits in other jurisdictions challenge perfunctory bail hearings and unaffordable bail amounts that overburden poor defendants.⁵¹ As cases like these proliferate, they may leave Michigan increasingly vulnerable to similar accusations.

There are significant practical drawbacks to needlessly incarcerating pretrial defendants. They risk losing their job, housing and even custody of their children. (Youth are harmed significantly by the incarceration of a parent.[†]) Pretrial defendants’ absence from the community can create additional disruptions for employers, landlords and dependent family members who may rely on the detained to work, pay rent, take children to school, etc. This can create a cascading effect of negative consequences for a defendant, as losing a job makes it harder to pay legal fees or fines resulting from the arrest and creates an incentive to participate in illegal activity for monetary gain.

* This practice has proved problematic in many jurisdictions, and some have faced lawsuits on the grounds that it violates due process. For example, see: *O’Donnell v. Harris County, Texas*, 882 F.3d 528 (5th Cir. 2018).

† Children of incarcerated parents are at increased risk of economic instability, emotional trauma, social stigma and committing criminal acts later in life. For a summary of some of this evidence, see: “Children of Incarcerated Parents” (Youth.gov, 2018), <https://perma.cc/D9RF-C6TS>.

Some defendants may even plead guilty simply to avoid or mitigate these losses.⁵² Rather than wait days, weeks or even months for trial, defendants may opt to trade a guilty plea for a negotiated sentence of “time served” that allows them to walk away without additional time behind bars, even if they aren’t actually guilty. For defendants in this situation, a guilty plea allows them to return to their personal lives and responsibilities. But now they will carry a criminal record that will burden them for the rest of their lives, potentially restricting future employment, housing and educational opportunities.

If a defendant cannot afford to pay bail to the court, his next best option may be to have a bondsman bail him out. But as described above, the bondsman’s fee is nonrefundable. Money bail left with the court, on the other hand, is refundable. That means that if a defendant is able to afford his bail, he obtains his release and has a strong incentive to make his court date so he can get his bail money back. A defendant who cannot afford his bail, on the other hand, can only obtain his freedom by paying a bondsman’s fee that may, all by itself, push him into debt or deeper into debt. He also faces weaker incentives to make good on his bail and appear in court, because the bondsman’s fee is nonrefundable. In other words, he has less to lose if he does skip bail, suggesting that court-imposed bail must be affordable to be most effective.

For all these reasons, a strong case can be made that policymakers should reconsider how bail works in Michigan. As it currently functions, bail appears to disproportionately and needlessly burden low-income defendants with legal disadvantages and disruptive absences from home and work. Meanwhile, taxpayers foot a portion of the bill for expensive incarceration which may actually make the incarcerated more likely to commit additional crimes in the future.⁵³ This system is hardly an ideal method of securing public safety and defendants’ court appearances.

An important point not to forget is that pretrial jail inmates are legally innocent. They have not been convicted of a crime and yet are subject to the same punishment intended for those who have been. Many pretrial inmates have been judged safe to be released and wish to be free, but are not, simply because they cannot afford even a few hundred dollars for bail — which is unfair to defendants and potentially more hazardous to public safety.⁵⁴

Recommendations for Reform

Policymakers are considering several ideas to reform the bail process in Michigan. Broadly speaking, proposed reforms aim to tie bail decisions more closely to key risk factors: whether the defendant is a danger to the community and whether the defendant is a flight risk.

One such reform would convert nonbinding court rules into law. The court rules say that judges making bail determinations should look at several factors. These include the defendant’s criminal record, record of appearance or nonappearance at other proceedings, history of substance abuse, mental condition, and moral character; the seriousness of the offense, availability of responsible citizens to vouch for and monitor the defendant, and his ties to the community. These court rules are not mandatory, however, and state law merely requires judges to consider the nature of the offense, the defendant’s criminal record, the protection of the public and the defendant’s probability of appearing.⁵⁵

The state could codify these court guidelines in statute, making the factors mandatory considerations rather than nonbinding ones. But new research has shown that these factors may not actually affect a defendant’s likelihood of making future court appearances or posing a risk to the community. For instance, a prior misdemeanor or a prior felony conviction does not increase the risk that he will fail to appear for trial, but it does increase the likelihood that he will engage in future

criminal activity.⁵⁶ Meanwhile, prior failures to appear do not increase the odds that the defendant will commit a new violent crime, but have been linked to a higher likelihood of failing to appear again.⁵⁷ The defendant's age, the nature and number of previous convictions, past failures to appear and the amount of time that has lapsed since the most recent failure to appear are evidence-based factors that must all be considered when making a pretrial release decision.⁵⁸ Accounting for these factors for each defendant would give judges a better way to make fair and consistent decisions.

Another reform proposal would require judges to take into account a defendant's financial standing when setting the bail amount and require defendants to make disclosures under oath regarding their assets. This would guard against courts setting bail amounts that defendants have no chance of affording. While the idea has merit, it would be better if implemented in conjunction with an assessment tool to ensure that courts do not over-rely on cash bail. Setting lower cash bail amounts, by itself, will not address the underlying issue that it would be just as safe and effective to reduce the use of cash bail overall.

Reformers have also proposed eliminating "interim bail." This practice is an exception to the usual pretrial release process, but it is a problematic one. While courts must make a judge or magistrate available to arraign felony defendants every day, the same is not true for misdemeanor defendants.⁵⁹ In those cases, courts are permitted to "work with local law enforcement to develop an interim bond schedule for the release of offenders pending arraignment on a misdemeanor offense."⁶⁰ Rather than hold a bond hearing, the practice of interim bail allows courts to specify "standing" cash bail amounts for different offenses. When a police officer executes an arrest, he may collect the bail money that corresponds with the

alleged offense from the offender and release him with an order to appear in court, rather than transport him to court for an arraignment or bond hearing.⁶¹ Courts may also issue arrest warrants that specify an amount of interim bail for a particular defendant.⁶² This policy is intended to allow those who can afford bail to avoid being detained until their arraignment. But it resembles the use of "bail schedules," which have been condemned as unconstitutional by the U.S. Department of Justice and face legal scrutiny in several jurisdictions for disproportionately burdening the poor.* The decision whether to detain someone in advance of their arraignment would be better based on the arrestee's risk of flight or danger to the community, but interim bail asks only whether he can afford to pay the prescribed amount.

Finally, policymakers should require courts to measure and report the outcomes of their bail practices. This is an important provision because, as noted throughout this report, there is currently a dearth of data on how courts use bail. This would have the benefit of allowing a more thorough analysis of how well bail functions in Michigan and could lead to future improvements.

But lawmakers should not stop there. As suggested by Maryland's example, successful bail reform is not self-executing — it may require additional changes to the way courts operate in order to function efficiently. For instance, if more people are going to be eligible for bail under these reforms, courts and communities may need to beef up their pretrial support structures. Bail is more likely to work for both the defendant and the court if there is someone to hold those out on bail accountable for resolving underlying issues such as addiction, mental illness or unemployment, when these issues contribute to flight risk or dangerousness.

* Ben Rosen, "DOJ: Stop Jailing People Just Because They Can't Afford Bail," *The Christian Science Monitor*, Aug. 21, 2016, <https://bit.ly/2vOvpfo>. The DOJ submitted an amicus brief in a class-action lawsuit before the 11th U.S. Circuit Court of Appeals, noting that fixed bail schedules discriminate based on indigence because they allow for the release of only those who can afford to pay. Relevant court cases include: *Stack v. Boyle*, 192 F.2d 56 (9th Cir. 1951); *Pelekai v. White*, 861 P.2d 1205 (1993); *Clark v. Hall*, 53 P.3d 416 (2002); *Jones v. City of Clanton*, Civil Action No. 2:15cv34-MHT (WO).

This does not necessarily mean that courts will need to make massive investments in pretrial services; simple tools can help. For instance, courts in California, New York and several other states have been testing the use of text message reminders to notify defendants of approaching court dates, which were shown to be effective at reducing failures to appear.⁶³ Practices like this one, which accounts for the practical fact that many people lack stable housing at which to receive hearing notices by mail, set defendants up for success and make justice more efficient, effective and accessible for everyone — which should be the ultimate goal of bail reform.

Conclusion

The priority for criminal justice policy is to promote public safety. But the current cash bail system allows people charged with rather serious crimes to make bail, while people accused of far less serious crimes are detained only because they cannot afford it. Moreover, research suggests that pretrial detention might do more harm than once believed, because it appears to contribute to increased recidivism rates, as defendants who cannot make bail are at risk of losing their employment and community ties.

Thus, lawmakers should carefully review the shortcomings of and inequalities perpetuated by the current bail system and consider the proposed reforms. They have the potential to make bail more fair, consistent and efficient and even can improve public safety and reduce recidivism rates. These benefits will accrue to the courts, the criminal defendants they try and the taxpayers who foot the bill.

Endnotes

- 1 U.S. Const. amend. VIII.
- 2 John-Michael Seibler and Jason Snead, “The History of Cash Bail” (The Heritage Foundation, Aug. 25, 2017), <https://perma.cc/FJ7Q-F6DN>.
- 3 “The Socioeconomic Impact of Pretrial Detention” (Open Society Foundations, 2011), <https://perma.cc/Q4FE-TM57>; Christopher T. Lowenkamp, Marie VanNostrand and Alexander Holsinger, “The Hidden Costs of Pretrial Detention” (The Laura and John Arnold Foundation, November 2013), <https://perma.cc/C24R-CX83>; Andrew D. Leipold, “How the Pretrial Process Contributes to Wrongful Convictions,” *American Criminal Law Review* 42, no. 4 (2005): 1123–1165, <https://perma.cc/A6BU-HKK7>.
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