

Pretrial Release: Restoring Due Process & Reforming Bail



SUMMARY

Releasing a defendant before trial using bail ensures that those who are presumed innocent until proven guilty can walk free until they are convicted or acquitted of a crime, while also ensuring they will not commit additional crimes upon release. The goal is to ensure justice while also keeping others safe.

The conditions of release are supposed to be based on an individual's risk of flight and danger to the community. Although cash bail and bail bonds are still widely used in most

pretrial hearings, they have not been used with their intended level of individualization because judges often lack adequate information to make this sort of personalized judgement.

As a result, the entire pretrial justice system has been largely inequitable—wealthier Utahns, regardless of their risk, are released on bail to await their trial while low-risk, poor Utahns are often incarcerated. By implementing a new risk assessment tool, judges can correct this unjust application of bail.

Utahns accused of a crime have the right to presumed innocence prior to trial, regardless of personal wealth.

Defendants are entitled to a presumption of innocence until they are proven guilty of an alleged crime. Because of this presumption, a defendant may be released from jail or custody while their criminal case is pending. That pretrial release is usually obtained through some type of bond.

While there are many forms of bonds available in Utah and elsewhere, this brief focuses on the types used commonly in our state and proposes some necessary reforms to ensure justice is being equitably served.

A common type of bond used in courts is **cash bail**, which is a bond that is set by the court to ensure the accused person shows up on their court date for trial. Cash bail must be paid in full by the accused individual and is returned if the person shows up to all court hearings and obeys the conditions of release.

A **surety bond**, also known as a bail bond, is a common type of bail for accused individuals who cannot afford to pay the full amount of their cash bail. To obtain a surety bond, a defendant must hire a commercial bail bondsman who is backed by a special type of surety insurance. The bail bondsman agrees to post the full bail amount for them while charging a fee—typically around 10 percent of the total cost of bail. Defendants are not refunded for this fee. A form of collateral insurance for the full amount is usually also required.

An **own recognizance release** allows a defendant to avoid jail time and a monetary bond, subject to conditions the judge may impose, such as requiring the person to appear in court. Similarly, a **citation release** allows the person, typically

for a low-level offense, to sign a promise that they will appear in court.

Some individuals may be released directly from jail by signing a **jail release agreement** that sets certain conditions for release, such as avoiding contact with the alleged victim. A judge can issue a **jail release court order** which also releases a defendant on specific conditions. These are specific to the type of offense committed and are not tied to monetary conditions.

Although the concept and use of property and cash bonds had been around for decades before the formation of the United States of America, it was not included in the Constitution itself. It was later added within the 8th amendment as part of the Bill of Rights.

The right to bail is included in sections eight and nine of Utah’s Constitution. Under Utah law, excessive bail is illegal, and, with only a few exceptions, all people have a right to bail.¹

Personal Impact

Fathers who have missed the birth of their children. Individuals who

return to a vacant apartment to find they have been evicted and their landlord has thrown out all of their possessions. People who lose their jobs that had been their main source of income to support themselves and their families. As one public defender in Utah put it, “I have had too many clients to count who have been negatively impacted by excessive bail amounts. It is a daily occurrence that clients from our office lose their job and housing.”²

One story helps illustrate this pattern that indigent defendants in Utah frequently face. A false accusation of rape led to a humiliating ordeal for Neal, a low-income man who was struggling to make ends meet. He found himself in a courtroom being charged with two counts of sexual assault—both of which were second degree felonies.

Homeless and lacking funds to pay for a lawyer, a public defender was assigned to his case. Fortunately for him, Neal landed a highly experienced attorney who genuinely cared about restorative justice. But even with a strong defense, Neal’s bail was set at \$20,000 during the pre-trial hearing.

With little money and almost no collateral to his name, Neal could not afford \$20,000, or even \$2,000 for a bond—a common occurrence for indigent Utahns unable to pay such a large amount of cash. But there was nothing he could do about it; he quickly realized he would spend time in jail for a crime he did not commit.

Neal probably could have taken a plea deal and gotten out of jail at any point. Guilty or innocent, taking a plea deal is a common outcome for those who cannot afford their

Utah’s pretrial system often deprives low-risk people of their presumption of innocence by unnecessarily incarcerating them before trial.

bail. “Many people will plead to whatever the prosecutor wants them to, if there is a condition of release,” one public defender explained.³ Most defendants are desperate to get out of jail so they can keep their job, home, and family intact.

Although the allure of outside life was tempting, truth and justice were more important to Neal. Adamant that he did not commit the crime, he waited until his trial to prove his innocence. As spring and summer came and went, Neal remained incarcerated—all because he could not afford to purchase his pretrial freedom, unlike wealthier defendants.

His trial didn’t take place until September 2017, nearly six months after the pretrial hearing. Just two days into the trial, the jury found him not guilty of all charges. He was released from jail that night. Although relieved to walk out of the courtroom with an acquittal, he had no recourse for those six stolen months of his life.

Systemic Problems

Neal’s experience with Utah’s criminal justice system is one example of countless others where individuals are unfairly treated due to their financial status or life circumstances. These experiences arise from a number of problems with the current pretrial system—problems that can each be addressed with a solution we later discuss.

Judges lack information

During pretrial hearings, judges often do not have enough information about accused individuals to make a well-informed decision about



bail amounts, pretrial release, or detention. This is the conclusion of two recent studies⁴—one by the Legislature and one by the Courts—that researched the effectiveness of Utah’s current pretrial release program.

Judges throughout Utah have to make sudden yet critical decisions about a defendant without adequate information about the person’s history, often relying only on a few paragraphs written by the arresting officer. Both reports assert that pretrial release decisions should be individualized and should not be completely reliant on a bail fee schedule, yet the status quo leads judges to depend almost entirely upon the standardized fee schedule for all defendants.

In order to properly make individualized decisions, judges need relevant information within reach to determine the defendant’s risk, either of failure to appear in court or of danger to the community, to more appropriately establish bail.

Injustice exists

In 1895, the U.S. Supreme Court held that individuals should be presumed innocent until proven guilty.⁵ Yet, Utah courts frequently treat accused individuals as guilty by unnecessarily detaining them before their trial.

Forty-three percent of Utah’s jail population is comprised of defendants still awaiting their trial.⁶ Before depriving a presumably innocent person of their freedom by incarcerating them before a conviction is obtained, the government should be able to articulate reasonable proof of a substantial risk to justify the person’s continued incarceration.

Unfortunately, most Utah courts do not determine bail outcomes based on the defendant’s risk level.⁷ As a result, some individuals are detained simply because they cannot afford to post a cash or bail bond. This is a gross injustice for people who are supposedly presumed innocent.

Predicating pretrial release on one's ability to pay makes indigent defendants vulnerable to prosecutors, as they are more likely to accept a plea deal or admit guilt—even if they are innocent—in order to leave jail so they can keep their job and their home.

Keeping indigent Utahns incarcerated also complicates their legal defense because of communication hurdles. Some jails have strict rules controlling free conversation between an inmate and their attorney. For example, the Utah County Jail insists on glass separation with communication only available through a telephone which jail officials could monitor and record.⁸ This means that from initial meeting to case closed, attorneys may not have any private, face-to-face conversations with the defendant they are representing.

By default, pretrial detention becomes a form of intimidation in which prosecutors can exert pressure to coerce a guilty plea.

The affluent are favored

A system based mostly on cash bail and bail bonds inherently favors those with money to buy their pretrial release—even if they are using unlawfully obtained money to pay their way out. Sometimes wealthy criminals can buy their temporary freedom with little concern about the loss if they do not show up for court.

A 2015 audit by the Utah Legislature found that 17 percent of cash bail cases had at least one failure to appear compared to 26 percent of surety bond cases.⁹ Taking a person's money is not necessarily a guarantee that they will show up for trial.

This systematic favoritism is unfair to those without means who are punished because they cannot afford to buy their freedom. Even though they are constitutionally presumed innocent, poorer Utahns are denied their true presumption of innocence by being forced to sit in jail, or even prison, until the date of their trial. The lack of a speedy trial is not uncommon as defendants can often wait for multiple months behind bars with little access to the outside world, where their lives could be crumbling apart. Jobs, housing, reputations, and relationships can all be lost as each day of incarceration passes.

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PERCENT OF UTAH REGISTERED VOTERS

believe that judges should be provided with a risk assessment of each defendant in order to give them more information on the threat they pose to society.¹⁰

Although judges have the option in Utah to set non-monetary conditions of release through an own recognizance bond, they rarely do so. It has become a trend in courtrooms all across the country to instead rely on cash bail as a standard practice, despite the devastating implications for low-income individuals.

Communities are jeopardized

Without adequate information to predict an individual's risk, judges could unknowingly be exposing Utahns to danger by releasing defendants who might cause others harm. One national study, conducted by University of Utah law professor Shima Baradaran, reviewed over 100,000 criminal cases to analyze pretrial detention rates. The study found that if the goal is to prevent more crime, the wrong people are often detained and released by judges.¹¹ The research shows that “about half of those detained have a lower chance of being rearrested pretrial than many of the people released.”¹²

Put simply, under the current system higher risk people are released before trial and can therefore cause trouble for the community while low-risk people who are unlikely to harm others remain locked up—all because courts have to rely on the traditional bail fee schedule, which doesn't prioritize a defendant's risk as a key consideration when setting bail.

It gets worse: some county jails in Utah are forced to turn possible criminals away because of overcrowding. Reforming pretrial release conditions would likely free up space within jails and allow law enforcement to focus on incarcerating higher risk offenders and repeat criminals—keeping Utah's streets and neighborhoods safer.

Costs are high

Overcrowding in jails leads to higher costs for taxpayers as more resources are needed and more jails are built or expanded. When

individuals can't afford to pay for cash bail or a bail bond, they are forced to remain in detention, sometimes for months on end. The burden of these living expenses is then transferred to the taxpayers who pay the government to house a low-risk—and presumably innocent—individual.

Utah taxpayers spend approximately \$81 per day per inmate.¹³ Nationally, pretrial detentions have been estimated to cost taxpayers over \$9 billion per year.¹⁴ Considering that many of these individuals may pose little to no risk to the community if they were freed while awaiting trial, the potential savings to taxpayers becomes significant.

Life-altering consequences

Individuals who spend even short amounts of time in jail are more likely to reoffend after they are released.¹⁵ These individuals become less likely to appear at their court date even after spending only three days in jail. Incarcerating the wrong people before trial can thus contribute to a rise in criminal activity.

A legislative audit reviewing county jails in Utah found that defendants awaiting trial are incarcerated for an average of 35 days. This number is artificially low because it includes detainees who were eventually released on bail. Individuals who are not released on bail typically spend a minimum of 60 days incarcerated before their trial.¹⁶

By detaining low-risk people before their trial, the court system contributes to an increase of recidivism and unnecessarily places an immense strain on the personal relationships and

professional activities of detainees. Such unwarranted disruption of an individual's life is justified when necessary, but for low-risk individuals should be altogether avoided under a system that allows the judge to assess their lack of risk and act accordingly.

The major costs of traditional pretrial release conditions raises the question: are cash bonds and bail bonds achieving the desired result? New York University Professor Arpit Gupta answered this question through his study of the bail system

of Philadelphia and Pittsburgh.¹⁷ He found “no evidence whatsoever that the imposition of bail caused defendants to return to court.”¹⁸ Why disrupt a person's life if the results do not match the system's intended purpose?

National Reform Efforts

New Jersey offers a potential model to follow, having transformed their state's entire pretrial release system. Instead of being money-based, like Utah's current system, they implemented a risk-based approach. Heavy reliance on cash bonds and bail bonds were replaced with a pretrial risk assessment of each individual defendant. New Jersey courts are now required to “assess the likelihood that a defendant will flee, commit new criminal activity, or obstruct justice by intimidating victims and other witnesses.”¹⁹

They do this with the help of a pretrial public safety assessment created by the Laura and John Arnold Foundation.

The assessment allows the judge to consider the criminal history and background of a defendant alongside the charges they are facing. Then, in cases where a judge has to make a choice about the defendant's pretrial release, he or she can make a more informed decision about what should be done. Increasingly, judges are able to set court dates without requiring

Use of a risk assessment system in New Jersey led to a 10.8% decrease in all crime and a 17.2% decrease of violent crime.

cash bond or a bail bond, allowing accused individuals to return home and continue with their life, preparing adequately for their defense as the trial date approaches.

Since the reforms were made, there has been a notable reduction of crime in New Jersey. There has been a 10.8 percent decrease in all crime and a 17.2 percent decrease of violent crime.²⁰ This has all occurred since the new pretrial reform. These astounding outcomes have, for New Jersey, resulted in an overall safer state and significant savings for taxpayers and defendants.

After just four months of the risk assessment program being implemented, New Jersey's Attorney General stated, “The two overarching goals of the new system largely are being met: prosecutors have detained without bail over 1,200 of

the state’s most violent, highest-risk offenders while, at the same time, low-risk, indigent defendants are not being incarcerated on low money bails that they cannot pay.”²¹

Other states, such as Arizona and Kentucky, and numerous cities across the country have followed New Jersey’s lead by beginning to implement similar risk-based assessment procedures in their courts.

New Jersey is apparently not an anomaly. Lucas County, Ohio, implemented the same tool in January, 2015. After a year of implementation, pretrial crime—violations of law by released defendants before their trial—decreased from 20 percent to 10 percent, while those re-arrested for committing violent crimes dropped from five percent to three.²² Additionally, the rate for failure to appear in court decreased from 41 percent to 29 percent.

This has all occurred while the percentage of people released on their own recognizance, without cash bail, has doubled.²³ These changes suggest that the new policy is effective. News of the success of this policy in Lucas County has been so well received that legislation has since been introduced to expand the the policy to every county in the state.²⁴

Pushback Against Reform

Opponents of pretrial reform argue that the court’s use of a risk assessment tool will result in jails becoming “revolving doors for criminals,” putting dangerous people back out on the street where they can do more harm. These largely unsubstantiated claims are only backed by a limited number of examples with carefully chosen stories where people who were released without required monetary bail went on to commit crime before their trial date.

There is no perfect criminal justice system that can absolutely prevent

all crime from occurring. There are anecdotal examples of people committing crime when released with no required bail, just as there are anecdotal examples of people committing crime when released with cash bail or bail bonds. What cannot be refuted are the statistics affirming the aggregate and overall effectiveness of pretrial risk assessments.

Some have also expressed concern about the possible increase of failure to appear rates. Results of a 2013 Pretrial Justice Institute study suggests otherwise. After analyzing the data of 1,900 cases in Colorado, it was found that those released on unsecured bonds had higher court appearance rates than those released on cash bonds.²⁵ This means that access to cash does not predict nor encourage the likelihood of a court appearance from defendants. Therefore, if a pretrial risk assessment results in an increase of those released without cash bond, the outcome will likely not negatively affect the number of people who appear for their trial date.

Goals of Pretrial Reform

- 1. Disconnect outcomes from one’s ability to pay**
 Justice should be blind; presumably innocent Utahns should not be subjected to heavier punishment merely because they are poor.
- 2. Prevent public threats from being released from jail**
 Defendants who pose a legitimate threat to others should not be released merely because they can pay bail or post a bond.
- 3. Reduce burden on taxpayers**
 Warehousing people before their trial comes at a great cost and should only be done when actually necessary.
- 4. Reduce overcrowding in Utah’s jails**
 Limited occupancy should be prioritized and reserved for violent convicts and defendants, not low-risk pretrial detainees.

Most importantly, with a pretrial risk assessment each and every accused person is viewed and treated fairly as an individual with a unique case and risk level that the judge can take into consideration. The computerized formula—which uses a publicly available algorithm—calculates the flight and safety risk of the individual and provides an objective, unbiased recommendation for judges to consider alongside their subjective discretion and observations. Without this tool, judges are often making release decisions based on limited, biased information.

PROPOSAL A: COMPREHENSIVE USE OF RISK ASSESSMENTS

We envision allowing law enforcement officers to utilize an electronic pretrial risk assessment while booking an individual for an alleged crime. This method has the potential to help jails avoid overcrowding while ensuring there will be room for more dangerous offenders. With the help of an assessment tool, officers can better determine an individual's risk and use their discretion to release low-risk offenders so they may wait at home until their court hearing. This would save jails—and taxpayers—significant resources.

In addition to risk assessment use during the initial booking, judges should be required to use this tool at the probable cause phase when they are making an initial release decision (within 24 hours of arrest), and at future bail hearings. This extra information would ensure objective consistency for every defendant accused of a crime.

PROPOSAL B: BETTER INFORMING JUDGES

At a minimum, Utah judges should be allowed to decide if they want to utilize a risk assessment tool in their courtroom. One such tool has been developed by the Laura and John Arnold Foundation with the help of leading criminal justice researchers who analyzed 750,000 cases from approximately 300 jurisdictions across the United States. Nine distinct factors were identified that best predict whether a defendant will fail to appear or commit new criminal activity if released. Judges are presented a numerical score quantifying these risks for each defendant to assist them in determining the conditions for the defendant's pretrial detention or release.

Denying judges this information is counterintuitive and contrary to evidence-based practice. Use of this informational tool would not eliminate cash bonds, bail bonds, or the bail fee schedule. All these options will still be available for judges to use if the risk assessment test is implemented.

Endnotes

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PUBLIC POLICY BRIEF

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FREQUENT
RECURRENCE
===== TO =====
FUNDAMENTAL
PRINCIPLES IS
ESSENTIAL
===== TO =====
THE SECURITY
===== OF =====
INDIVIDUAL
RIGHTS

UTAH CONSTITUTION
ARTICLE I, SEC 27