

## ENDING CASH BAIL IS A WOMEN’S RIGHTS ISSUE

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The long arm of the United States carceral system has grabbed hold of women in the last several decades. From 1980 to 2016, the number of incarcerated women increased more than 700%.<sup>1</sup> That is more than double the already staggering rate of increase for men during the same time period.<sup>2</sup> Nearly half of incarcerated women are held in jails—in stark contrast to the trends in the total incarcerated population, in which the state prison system holds twice as many people as jails.<sup>3</sup> Further, more than half of women held in local jails are being held pretrial, meaning they have not been convicted of a crime.<sup>4</sup> In concrete numbers, 231,000 women were incarcerated in the United States in 2019, and 26% of those women were not yet convicted of any crime.<sup>5</sup>

The ills of pretrial detention disproportionately affect women because they are more likely to be detained pretrial and because of their unique social and economic positions. For example, they are generally less financially solvent than a man in the same position, more susceptible to the abuse that runs through the carceral system, and more likely to be the primary caretaker of their children.<sup>6</sup> Suffering incarceration while still being considered legally innocent causes unnecessary trauma both to the detained individual and their family,<sup>7</sup> perpetuates the harms of overcrowding in jails,<sup>8</sup> and runs counter to the American axiom of innocent until proven guilty. In this way, ending the system of cash bail is a women’s rights issue, as women – particularly poor women of color – bear the brunt of the policy.

### I. Women Are Disproportionately Detained Pretrial

Women are generally less able to post bail, which results in their staggering rates of pretrial detention.<sup>9</sup> At its most fundamental level, cash bail criminalizes poverty, which is a condition disproportionately experienced by women, namely

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<sup>1</sup> *Incarceration of Women is Growing Twice as Fast as that of Men*, EQUAL JUST. INITIATIVE (May 11, 2018), <https://eji.org/news/female-incarceration-growing-twice-as-fast-as-male-incarceration/>.

<sup>2</sup> *Id.* See also Aleks Kajstura, *Women’s Mass Incarceration: The Whole Pie 2019*, PRISON POL’Y INITIATIVE (Oct. 29, 2019), <https://www.prisonpolicy.org/reports/pie2019women.html>.

<sup>3</sup> For the total incarcerated population in 2020, 1,291,000 are held in state prisons and 631,000 are held in local jails. *Id.*; Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL’Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html>.

<sup>4</sup> In 2019, 101,000 women were held in local jails and 61,000 of them had not been convicted of a crime. Kajstura, *supra* note 2.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Insha Rahman, *Bail and Pretrial*, VERA INST. OF JUST., <https://www.vera.org/ending-mass-incarceration/reducing-the-use-of-jails/bail> (last visited Nov. 7, 2020).

<sup>9</sup> See *id.* See also Kate Torgovnick May, *The hidden victims of the bail crisis? Women*, IDEAS.TED.COM (Apr. 12, 2019), <https://ideas.ted.com/the-hidden-victims-of-the-bail-crisis/>.

women of color, and their dependents. Simply put, to “post bail” means that a defendant pays a sum of money that has been determined by a judge in exchange for being let out of jail before their trial. If they return to all of their scheduled court dates, they will likely get that money back. The theory behind bail is that by collecting money from the defendant in exchange for their pretrial freedom, the defendant is incentivized to appear at their scheduled court date. If a defendant cannot post bail, they are kept in jail until trial. Ironically, women as a group tend not to be a flight risk,<sup>10</sup> rendering this theory behind bail moot.

In practice, the system of cash bail means rich people do not serve time pretrial, but poor people do: an individual can be stuck in jail for weeks or even months before trial simply because they cannot afford their freedom.<sup>11</sup> Though bail poses a problem for all poor defendants, it is particularly burdensome for women. The gender pay gap is well documented—in 2018, women earned, on average, just 82 cents for every dollar earned by a man, and that gap is better described as cavernous for women of color.<sup>12</sup> A study by the non-partisan Prison Policy Initiative found that “women who could not make bail had an annual median income of just \$11,071”—for Black women that number is just \$9,083.<sup>13</sup> When the typical bail amount rivals a full year’s income, it is no surprise that so many women are stuck in jail pretrial.<sup>14</sup>

## II. One Day Spent in Jail Before Trial is One Day Too Many

### A. *Individuals Entering Jail Are Subjected To Traumatic and Embarrassing Strip Searches Regardless of Conviction-Status*

No matter how short a pretrial detention period, the inability to post bail can expose women to unnecessary, traumatizing strip searches. In the name of safety and order in detention facilities, correctional officials may conduct degrading and humiliating strip searches of individuals entering the jail’s general population.<sup>15</sup> Even pretrial detainees are subject to these procedures, which often include invasive cavity searches.<sup>16</sup> Strip searches at a detention facility in California required women to “pull down [their] underwear ... spread [their] feet wide, and

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<sup>10</sup> *Id.*

<sup>11</sup> See Lea Hunter, *What You Need To Know About Ending Cash Bail*, CTR. FOR AM. PROGRESS (Mar. 16, 2020, 9:05 AM), <https://www.americanprogress.org/issues/criminal-justice/reports/2020/03/16/481543/ending-cash-bail/>.

<sup>12</sup> On average, white women earn \$0.79 on a white man’s dollar; Black women earn \$0.62; and Hispanic women earn \$0.54. See Robin Bleiweis, *Quick Facts About the Gender Wage Gap*, CTR. FOR AM. PROGRESS (Mar. 24, 2020, 9:01 AM), <https://www.americanprogress.org/issues/women/reports/2020/03/24/482141/quick-facts-gender-wage-gap/>.

<sup>13</sup> Kajstura, *supra* note 2.

<sup>14</sup> The median bail amount is \$10,000. See Bernadette Rabuy and Daniel Kopf, *Detaining the Poor*, PRISON POL’Y INITIATIVE (May 10, 2016), <https://www.prisonpolicy.org/reports/incomejails.html>.

<sup>15</sup> See, e.g., *Florence v. Bd. of Chosen Freeholders of the Cty. of Burlington*, 566 U.S. 318, 322, 335-337 (2012).

<sup>16</sup> *Id.* at 327.

bend at [their] waist ... [r]each behind with [their] hands, spread open [their] vagina lips, and cough.”<sup>17</sup> Such a procedure can understandably be traumatizing on its own, but in addition, incarcerated women are more likely than the general population to have experienced sexual trauma prior to their encounters with the carceral system. According to the Bureau of Justice Statistics, 57% of women incarcerated under state jurisdiction reported experiencing either sexual or physical abuse prior to their incarceration.<sup>18</sup> This means that a significant portion of these women detained pretrial are subject to sexual re-traumatization by an arm of the justice system, simply because they could not pay for their pretrial freedom.

### *B. Jails Foster Dangerous Environments and Provide Poor Living Conditions*

Professor Shon Hopwood of Georgetown University Law Center often repeats to his students that it is not uncommon for defendants to ask for a sentence of a year and a day in order to bypass jail and instead serve their sentence in prison. Jails, as a whole, are considered dangerously overcrowded and tend to be run more strictly with less resources.<sup>19</sup> For example, jail phone calls are three times as expensive as calls from prison and other communications are more restricted as well.<sup>20</sup> Compared generally to prisons, the lack of funding in jail manifests as worse living conditions, lack of access to health care—poignantly mental health care—and rehabilitation services, and makes for an overall more dangerous environment.<sup>21</sup> This is to say, that when given the choice between jail or prison, many find prison to be preferable to the stricter conditions of confinement in jails, and those more harsh conditions are the ones to which pretrial detainees are subjected.

### *C. Incarceration Engenders Psychological Trauma*

The psychological trauma of unnecessary and arbitrary pretrial detention can be debilitating.<sup>22</sup> At its most extreme consequence, suicide rates in jails are astonishingly high. In fact, suicide has been the leading cause of death in jails since 2000.<sup>23</sup> In a report prompted by the horrific circumstances of Sandra Bland’s death in pretrial detention, the Huffington Post reported that 25% of jail

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<sup>17</sup> *Amador v. Baca*, No. CV 10-01649-SVW-JEM (C.D. Cal. June 7, 2017); *See also* *Bull v. City & Cty. of San Francisco*, 595 F.3d 964 (9<sup>th</sup> Cir. 2010) (upholding VBC (visual body cavity) searches without individual suspicion as constitutional).

<sup>18</sup> *Women in the Criminal Justice System*, THE SENTENCING PROJECT 2 (2007) <https://www.sentencingproject.org/wp-content/uploads/2016/01/Women-in-the-Criminal-Justice-System-Briefing-Sheets.pdf>.

<sup>19</sup> *See generally* Alexi Jones, *Does our county really need a bigger jail?*, PRISON POL’Y INITIATIVE (May 2019), <https://www.prisonpolicy.org/reports/jailexpansion.html>.

<sup>20</sup> Kajstura, *supra* note 2.

<sup>21</sup> *Id.*

<sup>22</sup> Adureh Onyekwere, *How Cash Bail Works*, BRENNAN CTR. FOR JUST. (June 2, 2020), <https://www.brennancenter.org/our-work/research-reports/how-cash-bail-works>.

<sup>23</sup> *See* Dana Liebelson & Ryan J. Reilly, *Sandra Bland Died One Year Ago*, HUFFINGTON POST (July 13, 2016), <https://highline.huffingtonpost.com/articles/en/sandra-bland-jail-deaths/>.

suicides occurred within the first three days,<sup>24</sup> even when the individual who committed suicide had been arrested on minor charges that were extremely unlikely to result in prison time.”<sup>25</sup> This shocking statistic reflects just how anxiety-inducing and hopeless the criminal justice system feels from inside, just as much as it reflects on the bad conditions of confinement to which we subject those in jails.

On top of the individual trauma incarceration inflicts on women, it is not hard to imagine the additional stressors that the experience of incarceration—especially when inflicted pretrial—places upon a mother. Who will pick up her children from school that day and for every other day moving forward? How will they eat? Will they be properly taken care of?

### **III. Pretrial Detention Takes a Toll on Both the Individual Woman’s Life and That of Her Children**

Arrest and subsequent pretrial detainment can often happen suddenly and without warning, and the sudden removal of the mother from a household will often destabilize both her and the familial unit from which she is plucked. Nearly 80% of women in jail, including those held pre-trial, are single mothers.<sup>26</sup> Single mothers, particularly single mothers of color, are one of the lowest-earning demographics in the U.S.<sup>27</sup> Therefore, they are the least likely to be able to afford bail and more likely to be held pretrial than their childless or male counterparts.<sup>28</sup> Further, single mothers face significant barriers in accumulating wealth, which leaves many without an economic safety net.<sup>29</sup> So, when a big, surprise expense comes up, like bail, they often do not have the resources necessary to meet that expense.

#### *A. Pretrial Detention Has Resounding, Negative Consequences on the Children of Those Incarcerated*

The Prison Policy Initiative reports that 66% of women held pretrial are parents of minor children.<sup>30</sup> As mothers are typically the primary caregivers for minor

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<sup>24</sup> The video of Sandra Bland’s violent arrest centered her story among the sea of violent acts by police. She was pulled over after failing to signal a lane change and refused to put out her cigarette when asked to by the officer. He responded by forcibly removing her from the car and getting quite physical with her in the process. Bland was held pretrial because she did not have enough money for bail. Within 65 hours of her arrest, she had hanged herself in her jail cell. *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Samantha Cooney, *Women are the Fastest Growing Population in U.S. Jails*, TIME (Aug. 18, 2016, 1:08 PM), <https://time.com/4457322/women-jails-vera-institute-report/>.

<sup>27</sup> Sophia Kerby, *Pay Equity and Single Mothers of Color*, CTR. FOR AM. PROGRESS (Apr. 16, 2012, 9:00 AM), <https://www.americanprogress.org/issues/race/news/2012/04/16/11436/pay-equity-and-single-mothers-of-color/>.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Wendy Sawyer, *How Does Unaffordable Money Bail Affect Families?*, PRISON POL’Y INITIATIVE (Aug. 15, 2018), <https://www.prisonpolicy.org/blog/2018/08/15/pretrial/>.

children, taking the maternal figure out of the household can have devastating consequences on the family.<sup>31</sup> This is especially true—and painful—where mothers operate as both the primary caregiver and the breadwinner. As the number of women held in detention pretrial grows, so too does the number of destabilized and traumatized children.

It is not outlandish to imagine a scenario in which a woman is arrested while her children are oblivious to the situation. If she can afford bail for her charges, she will be released back to her life and her children. If not, her children might be waiting for her to come home, which will not happen. The uncertainty of such a situation is understandably destabilizing and frightening to a child. In *U.S. v. Hooks*, an Alabama District Court found the fact that Hooks, a single mother, had absolutely no arrangements in place for the care of her very young children was sufficient reason to merit her pretrial release.<sup>32</sup> The court stressed that her status as a single mother *alone* was not enough to warrant her release, but that, in her specific circumstances, the lack of a plan was sufficient.<sup>33</sup> It found that her immediate detention would punish her children and determined that to be unfair. But, is it not reductive to hold that being the sole caretaker of a minor child is not generally an extenuating circumstance in itself? Even if an average woman's circumstances are not quite as dire as that of Ms. Hooks, she still is likely to experience difficulty making arrangements for her children and will be subjected to all of the additional stress and anxiety that come with that frantic task. Further, this places unimaginable duress on children who, for all intents and purposes, rely on their mother for care, love, and life's necessities.

When their mother is incarcerated, many children will find themselves displaced and emotionally vulnerable. Currently, 45% of incarcerated mothers rely on their children's grandparents for caregiving responsibilities while they are in detention.<sup>34</sup> While there are certainly many benefits of being cared for by kin, these grandparents face many of their own challenges. Approximately one in four children living with a grandmother live in poverty, and one in three do not have health insurance.<sup>35</sup>

All children will react differently to these outward stressors, but some common experiences are anxiety, traumatic loss and stress, developmental regressions, and embarrassment.<sup>36</sup> Children in these situations are more likely to develop mental

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<sup>31</sup> Kajstura, *supra* note 2.

<sup>32</sup> *United States v. Hooks*, 330 F. Supp. 2d 1311, 1313 (M.D. Ala. 2004).

<sup>33</sup> *Id.*

<sup>34</sup> Creasie Finney Hairston, *Kinship Care When Parents are Incarcerated: What we Know, What we Can Do*, PRISON LEGAL NEWS, 7 (2009), [https://www.prisonlegalnews.org/media/publications/annie\\_e\\_casey\\_foundation\\_kinship\\_care\\_when\\_parents\\_are\\_incarcerated\\_report\\_2009.pdf](https://www.prisonlegalnews.org/media/publications/annie_e_casey_foundation_kinship_care_when_parents_are_incarcerated_report_2009.pdf).

<sup>35</sup> Nancy G. La Vigne, et. al, *Broken Bonds: Understanding and Addressing the Needs of Children with Incarcerated Parents*, URBAN INST. JUSTICE POLICY CTR. 6 (2008), <https://www.urban.org/sites/default/files/publication/31486/411616-Broken-Bonds-Understanding-and-Addressing-the-Needs-of-Children-with-Incarcerated-Parents.PDF>.

<sup>36</sup> *See Sawyer, supra* note 30.

health problems than their peers due in part to the absence of their parents, but also because of the “difficulty meeting basic needs” that arises “for families with a member in prison or jail.”<sup>37</sup> This can also result in lower educational achievement and impaired relationships at school.<sup>38</sup> Through no fault of their own, these children are being punished by the carceral system when their parents are taken away, especially when that is done so suddenly and before arraignment.

Where a woman is released on bail, she will have time to find living accommodations and guardians for her children. Additionally, this can serve as crucial time in emotionally preparing a child (and the mother, for that matter) for the whirlwind experience that is the criminal justice system. If a child is given time to learn what to expect from the incarceration of their mother instead of waking up one day to her absence, they will be better situated mentally for enduring the length of her sentence.

### *B. Women Held Pretrial Can Unnecessarily Face Loss of Jobs and Housing*

Again, because of how the cash bail system disproportionately disadvantages impoverished women of color, those held pretrial are more likely to be hourly wage workers,<sup>39</sup> working for minimum wage or less.<sup>40</sup> For these women, even a few days in jail can result in the loss of a job.<sup>41</sup> Because this group is also likely to live with meager financial means, losing a job can quickly put their housing at risk.<sup>42</sup> Ultimately, taking these women out of the home before trial, much less out of the workplace, causes them great economic distress that, in turn, can create generational trauma and perpetuate cycles of poverty.

## **IV. Ending Cash Bail Is Both Possible and Necessary**

A criminal justice system in which punishment comes only upon conviction is not a quixotic daydream but has actually become reality in the nation’s capital. Washington D.C., well ahead of the curve on criminal justice reform, began taking steps to eliminate cash bail in the 1960’s<sup>43</sup> and should now serve as a

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Poverty wages are “hourly wages that would leave them below the federal poverty guideline for their family size if they are the sole earner in the family, even if they work full-time, year-round.” See David Cooper, *Workers of color are far more likely to be paid poverty-level wages than white workers*, ECONOMIC POL’Y INST. (June 21, 2018, 4:53 PM), <https://www.epi.org/blog/workers-of-color-are-far-more-likely-to-be-paid-poverty-level-wages-than-white-workers/>. See generally

<sup>40</sup> Among those who earn minimum wage or less, 62% are women and 38% are men. Jens Manuel Krogstad, *More women than men earn the federal minimum wage*, PEW RESEARCH (May 5, 2014), <https://www.pewresearch.org/fact-tank/2014/05/05/more-women-than-men-earn-the-federal-minimum-wage/>.

<sup>41</sup> See Hunter, *supra* note 11.

<sup>42</sup> See *id.*

<sup>43</sup> Colin Doyle, et. al, *Bail Reform: A Guide for State and Local Policymakers*, CRIM. JUST. POL’Y PROGRAM HARVARD LAW SCH. 35 (2019),

model for the nation. The city now strongly favors unconditional pretrial release, employs strict timeliness requirements for assessing a defendant after arrest, and provides procedural protections for preventive detention.<sup>44</sup> The D.C. Bail Project, housed at Georgetown University Law Center, was a major player in these reforms, by “provid[ing] judges with background information about a defendant’s ties to the community to help judges make more informed decisions about release.”<sup>45</sup> Now, D.C. releases 94% of defendants pretrial, and 90% of them appear for their scheduled court dates.<sup>46</sup> Further, only approximately 2% were rearrested for a crime of violence while in the community pending trial.<sup>47</sup> If the goal of cash bail is truly to ensure a court appearance and protect community safety, the D.C. case study revealed the Emperor is not wearing any clothes.

Judge Truman Morrison of the D.C. Superior Court addresses those still skeptical of pretrial release by explaining that there will always be an element of risk in deciding to release an individual before trial. However, “that [is] the price of our ordered system of liberty and justice.”<sup>48</sup> The only way to ensure complete safety is to incarcerate the whole populous and that, of course, “is not the American way.”<sup>49</sup>

## V. Conclusion

Cash bail perpetuates a notion that is the very antithesis of the oft-quoted central tenet of the American criminal justice system: ‘innocent until proven guilty.’ The weight of pretrial detention falls disproportionately upon poor women and their families as do the subsequent burdens of the trauma of incarceration. Ending cash bail procedures is a major step toward ending the criminalization of poverty. Further, by eliminating the current cash for freedom system, the 26% of women currently held in jails pretrial will no longer be incarcerated a single day before they are found guilty by a jury of their peers, if that conviction ever comes. Instead of sitting behind bars, these women will be with their families, they will be contributing to the economies in their local communities,<sup>50</sup> and they will be given the time to make arrangements (if necessary) that ease the transition for both them and their children for their subsequent incarceration. Ending cash bail does not skirt the proper administration of justice, rather it humanizes and equalizes the process.

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<https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=9a804d1d-f9be-e0f0-b7cd-cf487ec70339&forceDialog=0>.

<sup>44</sup> *Id.* at 36-37.

<sup>45</sup> *Id.* at 35.

<sup>46</sup> *Id.* at 13.

<sup>47</sup> *Performance Measures*, PRETRIAL SERVS. AGENCY FOR D.C., <https://perma.cc/AT9Y-V4EL> (last visited Nov. 7, 2020).

<sup>48</sup> Melissa Block, *What Changed After D.C. Ended Cash Bail*, NPR (Sept. 2, 2018, 7:43 AM), <https://www.npr.org/2018/09/02/644085158/what-changed-after-d-c-ended-cash-bail>.

<sup>49</sup> *Id.*

<sup>50</sup> *See id.*