



Legal Background on Cash Bail Systems

Civil Rights Corps has engaged in groundbreaking litigation nationwide, enforcing the constitutional principle that no one should face imprisonment due to poverty. These cases have led to landmark victories in federal and state courts around the country.

Key Federal Constitutional Takeaways from Civil Rights Corps Litigation

- **Wealth-Based Pretrial Detention Systems Violate Equal Protection and Due Process.** When the government jails someone solely because she cannot access money, the government violates the constitutional principles of Equal Protection and Due Process.
 - **If Requiring Money Bail, Courts Must Consider Ability to Pay.** The Constitution forbids debtors' prisons. This means that when deciding whether to require money bail as a condition of release, courts must inquire into an arrestee's ability to pay. If the Court sets an amount of money as a condition of release, it must make a finding concerning whether the person can afford to pay it.
 - **When a Person Is Unable to Pay, Alternative Methods Must Be Considered.** When an inquiry into "ability to pay" shows that a person cannot pay, the court must consider less restrictive alternatives. These may include phone calls, text messages, various forms of check-ins and supervision, or other non-financial conditions of release. The legal touchstone is that a court must treat an unattainable financial condition as an order of pretrial detention that can be justified *only* when necessary as a *last resort* because no less restrictive alternative condition, or combination of conditions, will satisfy compelling interests.
 - **Due Process Protects the Fundamental Right to Pretrial Liberty.** The Supreme Court has held that: "In our society, liberty is the norm, and detention prior to or without trial is the carefully limited exception." As a result, any order that results in pretrial detention requires a finding that pretrial detention is necessary as a last resort because no other condition, or combination of conditions, exists to serve compelling interests.
 - **Heightened Scrutiny Applies to Cash Bail Systems That Detain the Indigent.** Courts subject cash bail systems that detain the indigent, even for short periods of time, to heightened constitutional scrutiny. As the Fifth Circuit in *ODonnell* held, heightened scrutiny is necessary when poor arrestees are jailed "where similarly situated wealthy arrestees are not, solely because the indigent cannot afford to pay a secured bond."
 - **Bail Determinations Must Be Based upon Rigorous Process.** When considering pretrial release or detention, the government must provide a rigorous adversarial hearing with notice, representation by counsel, the ability to present and confront evidence, findings by clear and convincing evidence, and a statement of reasons explaining the decision.
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- **The Government Interest Is in “Reasonably Assuring” Appearance and Safety.** When considering mechanisms that will encourage or compel people to make court appearances, the government is not entitled to an absolute guarantee of either appearance or community safety. Risk is inherent in the pretrial process, as it is in all prediction of human behavior. The government has a legitimate interest only in “reasonably assuring” appearance and safety.

Key Takeaways for Policymakers

- **Pursue Alternatives to Money Bail.** Using cash bail threatens a number of important constitutional rights. The easiest way to address this involves eliminating or, at the least, minimizing the use of financial conditions of pretrial release. There are many alternatives to pretrial jailing that are cheaper, easier, and more humane. These alternatives – from unsecured bail to text messages – have proven *more* effective at both assuring court appearances and keeping the community safe.
 - **Require Inquiry into Ability to Pay.** Numerous Supreme Court cases have held that the government cannot jail someone solely based on poverty. This means that, if money bail is being considered, the court needs to know – *can* this person pay? Policymakers should require “ability to pay” determinations whenever a financial condition of release is considered. If this inquiry shows inability to pay, the court cannot set unattainable bail *except* in narrow and exceptional circumstances and only when the court justifies such an order in the same way that it would justify an order of transparent pretrial detention.
 - **Ensure Robust Procedural Safeguards Before Requiring Pretrial Detention.** If the court is considering pretrial detention, robust procedures are required. The government must allow an adversarial hearing in open court and provide counsel. Before ordering pretrial detention, courts must meaningfully consider alternatives and make specific findings that *no less restrictive conditions of release* are available to “reasonably assure” court appearance or community safety.
 - **Immediately Release Low-Level Charges.** When designing pretrial systems, policymakers should maximize pretrial liberty for all arrestees. This means that several categories of criminal charge, such as misdemeanors and non-violent felonies, should trigger expedited release to avoid the serious harms of even a few days in jail. Other crimes should have a presumption of unconditional release, though an individualized assessment could reveal a need for other non-monetary conditions.
 - **Minimize the Pretrial Detention Net.** Most categories of crime should *never* yield pretrial detention. In the narrow situations that *are* eligible for pretrial detention, policymakers must use an individualized determination to examine whether “less restrictive alternatives” are possible.
 - **Avoid Replacement Policies with Unintended Consequences.** When considering bail reforms, policymakers should take care to design policies that do not create unintended consequences – consequences that could, in some cases, produce new Equal Protection or Due Process issues. For example, algorithmic risk assessment tools replicate many of the current issues surrounding racial discrimination and other bias. For this reason, they should not be implemented as part of bail reform.
 - **Remove Money from the System.** Policymakers should ensure that the inequities of the cash bail system are not reproduced by ensuring that indigent people are not charged fees or costs for non-financial conditions of pretrial release.
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