

Poverty Penalty: How the Cash Bail System Consistently Violates the 14th Amendment

Nyra Thakkar (author)¹

¹Cambridge Centre for International Research, Cambridge, United Kingdom

Abstract

The United States adheres to the principle of innocence until proven guilty; however, the cash bail system undermines this presumption by conditioning pretrial freedom on an individual's financial resources. Critics argue that this system produces wealth-based disparities in pretrial treatment, disproportionately affecting low-income individuals. This research examines the constitutional implications of the cash bail system, focusing on its impact on economically disadvantaged defendants and analyzing whether current practices violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment. This system affects over 500,000 people who remain in pretrial detention in the United States while awaiting trial outcomes, many detained solely because they cannot afford bail. To examine these matters, this paper uses doctrinal analysis of Supreme Court precedents, data from criminal justice research organizations, and historical examinations of bail reform to analyze the relationship between money-based pretrial release and wealth inequality. Focusing on federal and state practices, national pretrial studies reveal that defendants unable to afford bail face higher rates of pretrial detention, increased pressure to accept plea

bargains, and significant barriers to maintaining economic and social stability. Although constitutional precedent prohibits incarceration based on inability to pay, current cash bail practices continue to function as a wealth-based barrier to liberty. This paper argues that transitioning to pretrial supervision programs can uphold constitutional mandates while ensuring public safety. These alternatives demonstrate that court appearance can be ensured without reliance on financial status.

Keywords: cash bail, Fourteenth Amendment, pretrial detention, equal protection, wealth-based incarceration

Introduction

The American criminal justice system's pretrial detention practices raise fundamental questions about equal justice. These practices discriminate against defendants based on financial resources rather than culpability. At the center of this inequality is the cash bail system. Cash bail is a sum of money set by a judge that defendants must pay to be released from jail while awaiting trial. The amount serves as a financial guarantee ensuring the defendant will appear in court and is returned once all court requirements are met. The amount of bail is determined by the seriousness of a defendant's offense, prior criminal record, and/or flight risk. If a defendant is unable to pay bail, they will remain incarcerated until the trial date, which can last from weeks to years, often leading to guilty pleas in exchange for release from custody. Empirical research has documented the scale and consequences of wealth-based detention. The Brennan Center for Justice reports that 2/3 of the 750,000 people in U.S. jails are legally presumed innocent, detained solely because they cannot afford bail.

Furthermore, studies of pretrial outcomes reveal that the majority of arrested defendants pose minimal risk. Data from the New York City Criminal Justice Agency showed that among nearly 50,000 people awaiting trial outcomes, 95.7% faced no new arrests or charges during the pre-trial period (Brennan Center for Justice, 2024). However, the constitutional implications of cash bail have received insufficient attention in legal scholarship, particularly regarding whether cash bail practices violate constitutional protections under the 14th Amendment. A prominent example of the consequences of money-based pretrial detention is Kalief Browder, who was only 16 years old when he was arrested for allegedly stealing a backpack. On account of his inability to afford bail, he spent over 1,100 days in Rikers Island Jail and more than 700 of them in solitary confinement. Drawing on Supreme Court precedents and historical analyses, this paper demonstrates that this contemporary bail system violates the 14th Amendment guarantees of due process and equal protection by disproportionately detaining low-income defendants based on wealth rather than risk, coercing guilty pleas through prolonged detention, and creating unequal legal outcomes based on economic status.

Historical Development of Cash Bail in the United States

The cash bail system originated in medieval England as a mechanism to guarantee a defendant's appearance in court. This practice reinforced an early connection between financial conditions and court compliance, relying on money and sureties to ensure a defendant's return for trial. By the late 19th century, the commercial bail system had evolved significantly. The Bail Reform Act of 1898 shifted the requirement for release from personal sureties to a mandatory fee, fundamentally altering the system's focus from community accountability to financial capacity (Advancing Pretrial Policy and Research, 2023).

Consequently, the system increasingly relied on defendants' financial means rather than assessing their likelihood of appearing in court. As economic disparities became apparent, courts recognized that many defendants faced prolonged pretrial detention due to their inability to pay. This awareness prompted Congress to pass the Bail Reform Act of 1966, which aimed to prevent individuals from being incarcerated due to financial hardship. The Act established that poverty should not serve as a basis for pretrial detention. It authorized release on recognizance for defendants who posed no significant risk or danger to public safety (Austin et al., 2017). However, these reforms proved limited in scope, as the Act did not explicitly prohibit the use of money bail. In the 1970s and 1980s, rising crime rates led lawmakers to abandon these reforms. Courts and legislatures increasingly adopted 'tough on crime' policies that prioritized incarceration over bail reform. These policies reinforced systemic inequities by expanding reliance on cash bail, ensuring that wealth, rather than risk assessment, determined pretrial outcomes. This development escalated economic disparity and effectively reversed prior reforms. Although the Bail Reform Act of 1966 marked progress toward equitable pretrial practices, its narrow focus allowed money bail to remain dominant. This historical trajectory demonstrates how the system's economic inequities undermine the 14th Amendment's constitutional guarantees of equal protection. The persistence of these violations reveals that constitutional violations of cash bail are not incidental but structural, requiring comprehensive reform rather than incremental adjustment.

Economic Reality of Cash Bail

Multiple studies converge to show that the justice system disproportionately impacts economically disadvantaged individuals. The financial reality that most Americans face

makes cash bail particularly punitive. The Vera Institute reports, “Nearly 40 percent of people in the United States struggle to afford a \$400 emergency expense, yet the median bail set on a felony case is \$10,000” (Vera Institute, n.d). This financial barrier becomes more pronounced in situations where judges set bail amounts that appear disproportionate to the severity of the alleged offense. For example, the Bail Project documented a case in which an individual was accused of shoplifting merchandise valued at less than \$250 and received a bail amount of \$142,750 (The Bail Project, 2024). This disparity illustrates how bail amounts reflect wealth-based punishment rather than risk assessment. When defendants cannot afford bail, they often plead guilty, regardless of case merits, to avoid prolonged pretrial detention. This effectively eliminates the defendant's ability to exercise fundamental procedural rights, as pleading guilty waives the right to a trial by jury and the right to contest charges. The Office of Justice Programs reports that the average length of pretrial detention is 135 days, depending on jurisdiction (Carstensen, 1980). Under these conditions, defendants face significant pressure to accept plea agreements, reflected in trial rates of less than 2 percent in states such as California, Florida, Pennsylvania, and Texas between 2012 and 2015 (Vera Institute, 2024). Long pretrial wait times directly influence defense decisions and subsequent case outcomes. Proponents of cash bail argue that pretrial detention serves a legitimate public safety function by incapacitating potentially dangerous defendants. However, empirical evidence indicates that pretrial outcomes are more closely correlated with financial security than assessed risk. The data show a consistent pattern in which economic status, rather than culpability, predominantly determines freedom and legal outcomes, placing low-income individuals at a systematic disadvantage. Such disparities raise substantial questions regarding compliance with the 14th Amendment's equal protection and due process clauses.

Equal Protection Clause Violations

The cash bail system disproportionately affects low-income defendants by creating wealth-based detention that violates equal protection principles, incarcerating individuals in pretrial detention without regard to their ability to pay. In 1983, the US Supreme Court ruled in the case of *Bearden v. Georgia* that it was unconstitutional to impose a prison sentence for inability to pay fines or restitution, thereby protecting individuals from unfair imprisonment (*Bearden v. Georgia*, 1983). The Court held that incarceration was only unconstitutional when the individual had made good-faith efforts to pay, but lacked the financial means to do so. *Bearden* prohibits imprisonment for inability to pay after a conviction, in contrast to the cash bail system, which detains individuals before trial and without assessing ability to pay or good-faith effort. However, this temporal distinction lacks constitutional significance. If the 14th Amendment prohibits wealth-based detention after conviction, it must also prohibit wealth-based pretrial detention, where defendants retain the presumption of innocence. *Bearden* established that financial status cannot determine access to liberty, a holding that extends to pretrial detention. Despite this precedent, bail systems persist by treating pretrial detention as categorically different from post-conviction incarceration. Courts attempt to justify this by distinguishing pretrial from post-conviction detention, but *Bearden's* equal protection reasoning applies to both contexts. By permitting wealth-based pretrial detention, modern bail practices violate the Equal Protection Clause of the 14th Amendment in the same way *Bearden* prohibited wealth-based post-conviction detention. These practices reveal a significant gap between the intent of the 14th Amendment and its application in pretrial detention.

Empirical evidence from national pretrial detention studies demonstrates systematic constitutional violations inherent in cash bail practices. The Brennan Center for Justice reports that two-thirds of the approximately 750,000 people held in U.S. jails are awaiting resolution of their cases, meaning they are legally presumed innocent. This creates differential treatment where identical defendants face opposing outcomes, detention or release, based on financial capacity, directly violating equal protection principles. The cash bail system detains individuals based on their inability to pay, forcing those without financial means into prolonged pretrial detention while similarly situated wealthy defendants secure immediate release. Proponents justify this disparity by arguing that cash bail protects public safety and prevents flight or reoffending, but empirical evidence refutes these rationales. The Brennan Center for Justice reports that data from the New York City Criminal Justice Agency found that nearly 50,000 people were awaiting the outcome of their criminal cases, with 95.7% not facing any new arrests or charges as of December 2023 (Brennan Center for Justice, 2024). This data directly refutes the public safety rationale for cash bail, illustrating that detained defendants overwhelmingly pose no danger to the community. These detention practices, which incarcerate legally innocent individuals based on financial status, fail both prongs of the 14th Amendment, denying equal treatment under law and depriving liberty without due process. This system perpetuates a cycle of incarceration and poverty, depriving defendants of their liberty before any finding of guilt, exacerbating socioeconomic disparities.

Due Process Clause Violations

The cash bail system has devastating effects on individuals forced into pretrial detention, undermining the presumption of innocence from the moment of detention. Despite this constitutional guarantee, defendants face pressure to plead guilty simply to regain their freedom. This detention without conviction contradicts procedural fairness and disrupts housing, employment, and family stability. The cash bail system violates the Due Process Clause of the 14th Amendment, which is intended to safeguard fair treatment and protect liberty. The case of Kalief Browder, introduced earlier, exposes the human cost of this violation. In 2010, Kalief Browder was arrested for allegedly stealing a backpack. Unable to afford his \$3,000 bail, he spent three years detained in a 7-by-12-foot cell for 23 hours daily, facing devastating consequences. Despite the prospect of immediate release, Kalief refused to accept any plea deals, maintaining his innocence for a crime he did not commit. His refusal contrasts with most defendants, as most defendants plead guilty to avoid prolonged detention regardless of actual guilt, a pattern documented by criminal justice researchers. His case reflects the structural pressure that cash bail imposes, pushing defendants towards guilty pleas regardless of actual guilt. He persisted to clear his name, claiming, “Nobody would take the time to listen to me. And I’d just been another criminal” (ABC News, 2015). Browder's story demonstrates how wealth shapes who is heard and who is dismissed in the legal system. At just 16 years old, Browder spent over three years enduring regular beatings, starvation, solitary confinement, and attempted suicide at least 6 times. His experience highlights the human cost beyond statistics: his court date was postponed more than 30 times, and he was never given a trial, systematically diminishing his due process protections. In May of 2013, at 19 years old, his charges were dropped, and he was released without conviction. The cost of

Kalief's inability to pay his bail of \$3,000 was far greater than the monetary cost. In 2015, at just 22 years old, Kalief Browder died by suicide, unable to recover from the trauma of his detention, for a crime he did not commit. His death underscores the system's failure to protect the rights it is legally bound to uphold.

Browder's experience reflects a broader systemic pattern; it is not an isolated incident. The Vera Institute highlights that in 2022, nearly 90 percent of people charged in federal criminal cases pleaded guilty and never went to trial. This prevalence is staggering; a guilty plea occurs every two seconds for criminal cases during a typical workday, demonstrating that the system prioritizes efficiency over justice (Vera Institute, 2024). Defendants are forced to choose between prolonged detention and coerced guilty pleas. This reliance on coercive pleas strips defendants of their Sixth Amendment right to a prompt and fair trial; a right that, like the 14th Amendment's due process protections, cannot be conditioned on financial capacity. Constitutional rights are transformed from guarantees into a conditional privilege dependent on wealth.

Evidence-Based Alternatives Demonstrate Cash Bail Is Unnecessary

Supporters of the cash bail system argue that financial incentives ensure court appearances and that pretrial detention maintains public safety. This rationale lacks empirical support. In practice, cash bail creates a two-tiered system where pretrial freedom depends on financial capacity rather than assessed risk, pressuring indigent defendants to plead guilty to escape detention. Non-monetary alternatives achieve equivalent court appearance rates. The ACLU of Pennsylvania found that simple court reminders via phone calls and mail increased appearance rates by up to 42 percent and 33 percent, respectively. Similarly, Uptrust, a non-

profit organization that partners with public defenders, uses text messages to remind clients of their court dates, achieving a 95 percent court appearance rate (ACLU of Pennsylvania, 2021). These findings demonstrate that the government's asserted interest in ensuring court appearance does not justify the constitutional harm of wealth-based detention. Court appearance, cash bail's stated purpose, can be achieved through equally effective, less restrictive alternatives. A system that relies on wealth rather than risk to determine pretrial freedom perpetuates economic inequality and violates the principle of equal justice under the law.

Conclusion

The constitutional violations inherent in cash bail demand immediate reform. More than 150 years after the ratification of the 14th Amendment, the cash bail system continues to violate constitutional guarantees. The scale of this violation is staggering: the Brennan Center reports that approximately 526,000 people in the United States are held in pretrial detention, exceeding the total incarcerated population of most countries. Evidence-based alternatives that achieve equivalent results, such as text reminders, release on recognizance, and pretrial supervision, would eliminate coercive plea practices while maintaining court appearance rates. Implementing those reforms would improve equitable legal outcomes without compromising public safety or court compliance. This research supports ongoing bail reform efforts by demonstrating that current practices violate foundational constitutional principles. Reforming the cash bail system is constitutionally imperative to restore the 14th Amendment's guarantee of equal protection and due process.

References

- ABC News. (2015, June 17). Who Kalief Browder might have been if he hadn't spent over 1,000 days in jail without a conviction. <https://abcnews.go.com/US/kalief-browder-spent-1000-days-jail-charges/story?id=31832313>
- ACLU of Pennsylvania. (2021). Smart justice: Ending cash bail. <https://www.aclupa.org/smart-justice-ending-cash-bail/>
- Advancing Pretrial Policy & Research. (2025, August 20). The meaning of "bail" has strayed far from its legal roots. <https://www.advancingpretrial.org/news/the-meaning-of-bail-has-strayed-far-from-its-legal-roots/>
- American Bar Association. (2023). The high price of cash bail. <https://www.americanbar.org/groups/crsj/resources/human-rights/archive/high-price-cash-bail/>
- Austin, A., et al. (2017). The presumption for detention statute's relationship to release rates. *Federal Probation*, 81(2). https://www.uscourts.gov/sites/default/files/81_2_7_0.pdf
- Bearden v. Georgia, 461 U.S. 660 (1983). <https://supreme.justia.com/cases/federal/us/461/660/>
- Carstensen, T. P. (1980). Duration of pretrial detention. Office of Justice Programs. <https://www.ojp.gov/ncjrs/virtual-library/abstracts/duration-pretrial-detention>
- Coming, C. (2017, December 12). A brief history of cash bail. ACLU of Ohio. <https://www.acluohio.org/news/brief-history-cash-bail/>

Data Collaborative for Justice. (2025, October 9). Testing the long-term impact of bail reform across New York State: A quasi-experimental evaluation.

<https://datacollaborativeforjustice.org/work/bail-reform/testing-the-long-term-impact-of-bail-reform-across-new-york-state-a-quasi-experimental-evaluation/>

Dholakia, N. (2023, September 21). How the United States punishes people for being poor.

Vera Institute of Justice. <https://www.vera.org/news/how-the-united-states-punishes-people-for-being-poor>

Dholakia, N. (2024, April 4). How the criminal legal system coerces people into pleading

guilty. Vera Institute of Justice. <https://www.vera.org/news/how-the-criminal-legal-system-coerces-people-into-pleading-guilty>

Hernández, A. (2024, March 18). "Tough-on-crime" policies are back in some places that had reimagined criminal justice. Stateline. [https://stateline.org/2024/03/18/tough-on-](https://stateline.org/2024/03/18/tough-on-crime-policies-are-back-in-some-places-that-had-reimagined-criminal-justice/)

[crime-policies-are-back-in-some-places-that-had-reimagined-criminal-justice/](https://stateline.org/2024/03/18/tough-on-crime-policies-are-back-in-some-places-that-had-reimagined-criminal-justice/)

Hernández, A. (2025, September 23). Cashless bail, explained: What it is, how it works and

why Trump is targeting it. Stateline. <https://stateline.org/2025/09/23/cashless-bail-explained-what-it-is-how-it-works-and-why-trump-is-targeting-it/>

Jones, E. R. (1995). Failure of the "get tough" crime policy. Office of Justice Programs.

<https://www.ojp.gov/ncjrs/virtual-library/abstracts/failure-get-tough-crime-policy>

Justia. (2018, April 25). What is bail? How do I pay bail? What is a bond?

<https://www.justia.com/criminal/bail-bonds/>

Kennedy, L. (2025, September 5). The evolution of the bail system in America. History.

<https://www.history.com/articles/bail-system-america-timeline>

Mauksch, C. (2024, March 7). Minor offenses, major consequences. The Bail Project.

<https://bailproject.org/learn/minor-offenses-major-consequences/>

Nellis, A. (2024, February 14). How mandatory minimums perpetuate mass incarceration and what to do about it. The Sentencing Project. [https://www.sentencingproject.org/fact-](https://www.sentencingproject.org/fact-sheet/how-mandatory-minimums-perpetuate-mass-incarceration-and-what-to-do-about-it/)

[sheet/how-mandatory-minimums-perpetuate-mass-incarceration-and-what-to-do-about-it/](https://www.sentencingproject.org/fact-sheet/how-mandatory-minimums-perpetuate-mass-incarceration-and-what-to-do-about-it/)

New York City Criminal Justice Agency. (2021). How many people are in the community awaiting disposition of a NYC criminal case? [https://www.nycja.org/people-in-](https://www.nycja.org/people-in-community)

[community](https://www.nycja.org/people-in-community)

Schwartz, M., & Winerip, M. (2015, June 8). Kalief Browder, held at Rikers Island for 3 years without trial, commits suicide. The New York Times.

<https://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html>

Seid, B. (2024, March 13). The facts on bail reform in New York: How pretrial detention and release works now. Brennan Center for Justice. [https://www.brennancenter.org/our-](https://www.brennancenter.org/our-work/research-reports/facts-bail-reform-new-york-how-pretrial-detention-and-release-works-now)

[work/research-reports/facts-bail-reform-new-york-how-pretrial-detention-and-release-works-now](https://www.brennancenter.org/our-work/research-reports/facts-bail-reform-new-york-how-pretrial-detention-and-release-works-now)

United States Pretrial Services Agency, Eastern District of Michigan. (2020). Historical background. https://www.miept.uscourts.gov/historical_background.cfm

U.S. Department of Justice. (1988, February). The decision to release or detain defendants prior to trial: A special report on the operation of the Bail Reform Act of 1984.

Bureau of Justice Statistics. <https://bjs.ojp.gov/content/pub/pdf/prd-bra84.pdf>

Vanderbilt Law Review Staff. (2025). Bail reform in the state and federal systems. Vanderbilt Law Review, 20(4). <https://scholarship.law.vanderbilt.edu/vlr/vol20/iss4/4/>

Vera Institute of Justice. (2015). Bail reform. <https://www.vera.org/ending-mass-incarceration/criminalization-racial-disparities/bail-reform>

Wylie, S., & Grawert, A. (2024, March 13). Challenges to advancing bail reform. Brennan Center for Justice. <https://www.brennancenter.org/our-work/research-reports/challenges-advancing-bail-reform>