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Defendants Can't Be Jailed Solely Because of Inability to Post Bail, Judge Says

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Timothy C. Evans, Cook County's chief judge, administering the oath of office to Mayor Rahm Emanuel of Chicago in 2015. Credit Charles Rex Arbogast/Associated Press

The chief judge of the Circuit Court of Cook County, Ill., [issued an order](#) on Monday that bail-reform advocates hope will be a turning point in the national controversy over requiring defendants to pay more money than they can afford in order to be set free on bail before their trials.

The judge, Timothy C. Evans, announced that judges in Chicago could still set bail to ensure that defendants appear in court. But they will be required to determine whether the “defendant has the present ability to pay the amount necessary.” In other words, it will no longer be possible to set bail so high that people do not have enough money to pay for their release, which could mean they remain in jail for months or even years before a trial, a plea bargain or a dismissal.

Under the order, judges in Chicago will still be allowed to release defendants on their pledge to appear for their court date — or to deny bail altogether because of flight risk or danger to the community.

Judge Evans's order is an effort to ameliorate what critics say is one of the most glaring inequities in the criminal justice system: the ability of defendants with more money to post bail and avoid jail time.

Cara Smith, the chief policy officer for the Cook County sheriff, Tom Dart, who supports bail-reform efforts, called the order a "positive step." The Cook County state's attorney, Kim Foxx, who has also supported bail reform, said the order was "important guidance for the judiciary and the entire criminal justice system on the need to reduce our reliance on monetary bond." Nationally, some prosecutors oppose reform efforts, arguing that the changes could hurt their ability to protect the public.

But Washington and some other areas already have more progressive bail-setting systems, and now the Cook County order could prove momentous, reform advocates say.

"Chicago is now the largest place in the country to eradicate wealth-based detention," said Alec Karakatsanis, the founder and executive director of Civil Rights Corps, which has helped lead bail-reform efforts across the country.

How has the system worked in Cook County?

Except for those held without bond or released on their own recognizance, defendants have typically been required to produce 10 percent of a bond set by a judge in order to avoid pretrial incarceration. This has often resulted in 10 percent of a \$50,000 or \$100,000 bond — an amount that exceeds what many defendants can readily produce.

Last year, [The Chicago Tribune reported](#) that as many as 300 prisoners in the Cook County Jail had been incarcerated because they could not scrape together \$100 to post bail.

Has this been common in other parts of the country?

Reform advocates estimate that nearly half a million people are locked away in jails nationally because they cannot afford to post bail before their trials.

This issue has been around for decades. President [Lyndon B. Johnson](#) once noted that a poor defendant "does not stay in jail because he is any more likely to flee before trial."

"He stays in jail for one reason only — he stays in jail because he is poor," Johnson said.

What has wealth-based pretrial detention meant more broadly?

Studies indicate that those incarcerated before a trial or a plea bargain or before charges are dismissed are at greater risk of losing their jobs, their homes or even custody of children. They are also more likely to commit other crimes once released.

Even a few days of pretrial confinement can seriously destabilize a person's life, potentially leading to later problems. Not only does this cost society more in the long run, but it also means

that taxpayers foot the bill for nonviolent defendants who are locked up at \$100 a day or more, even though they pose little threat.

Is momentum for bail reform growing in other parts of the country?

In some places. New Jersey recently enacted serious bail reforms, though [some prosecutors argue](#) that the changes make it harder to protect the public. In many places there is also opposition from the bail-bonds industry, which wields a lot of political power.

Advocates for bail reform have also used the courts. In April, for example, a federal judge in Houston ruled that Harris County could not keep those arrested on misdemeanor charges in jail because they could not afford bail. The judge, Lee H. Rosenthal, who was appointed by the first President Bush, found that the system disproportionately affected indigent residents and violated “equal protection rights against wealth-based discrimination.”

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