

# Broken Rules

Laws Meant to End Debtors' Prisons are Failing Nebraskans

December 2022

**ACLU**  
**SMART**  
**JUSTICE**  
Nebraska



# About the ACLU of Nebraska and its Campaign for Smart Justice

The American Civil Liberties Union (“ACLU”) of Nebraska is a nonprofit, nonpartisan organization that works to defend and strengthen the individual rights and liberties guaranteed in the United States and Nebraska Constitutions through policy advocacy, litigation and public education.

The ACLU of Nebraska intentionally prioritizes the needs of historically unrepresented and underrepresented groups and individuals who have been denied their rights, including people of color, women, LGBTQ+ Nebraskans, Nebraskans impacted by the criminal legal system, students and people with disabilities.

A major focus of this work is addressing the harms of mass incarceration. Nebraska’s criminal legal policies have created a system of mass incarceration that hurts our communities and disproportionately impacts Nebraskans who are financially struggling and Nebraskans of color. A continual concern is that the existing conditions of confinement violate the Eighth Amendment’s protection against cruel and unusual punishment and do not provide Nebraskans with a meaningful transition back into our communities. The ACLU of Nebraska is leading the way to rethink and reform these policies and conditions through its Campaign for Smart Justice to protect individual rights, reduce the taxpayer burden and make communities safer.



# Introduction

Fairness and freedom should not depend on how much money an individual possesses. Nebraskans who are struggling financially should have the same experience in the legal system as anyone else. Yet today, despite United States Supreme Court precedent and safeguards at the federal and state level, Nebraskans are still routinely confined simply because they lack the resources to pay fines or post bail or bond.<sup>1</sup>

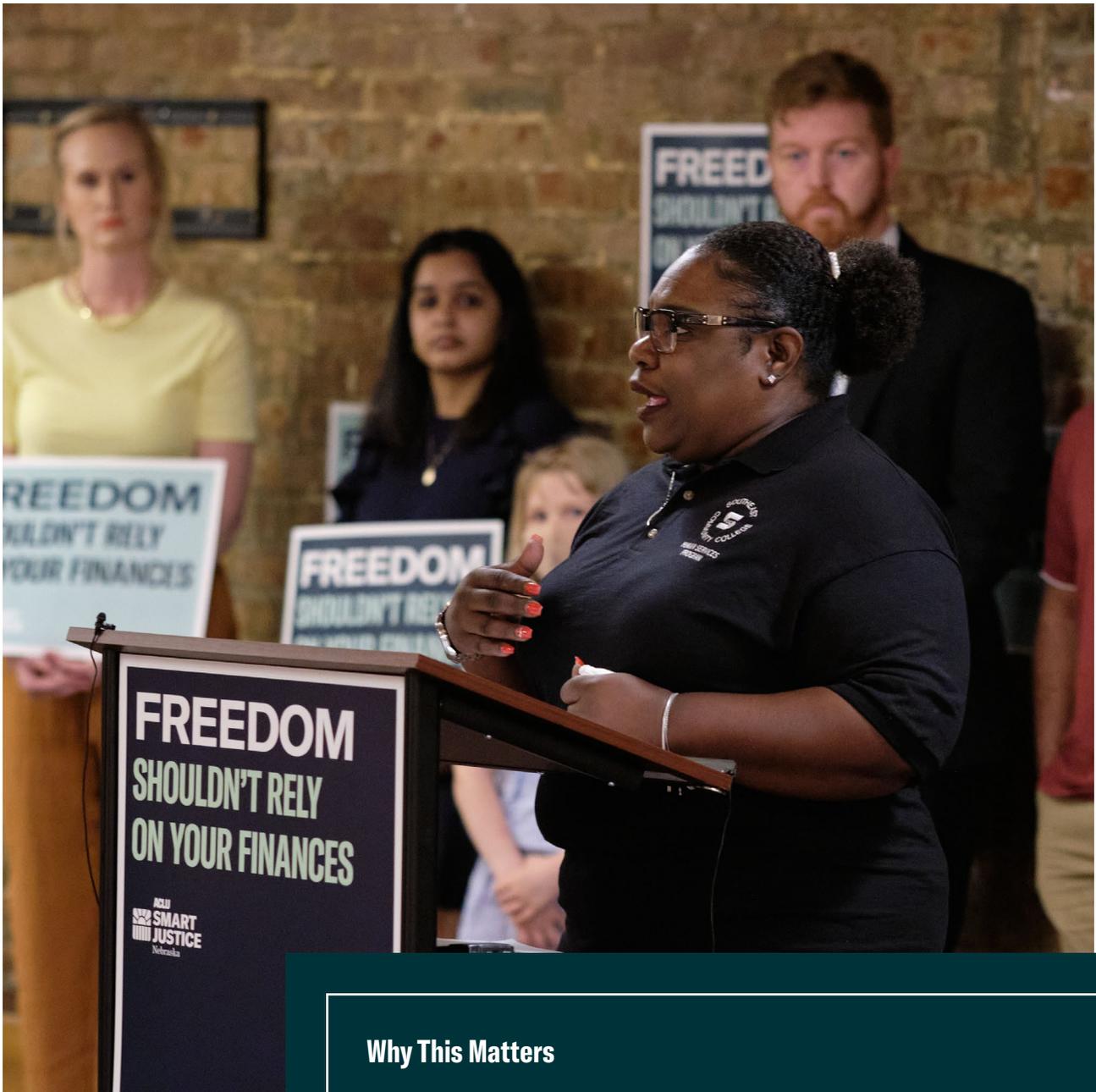
This report reveals the findings of an intensive ACLU of Nebraska court watching project, the first of its scope in the state. ACLU staff and interns spent roughly three months in 2022 observing bail and sentencing hearings to document how recent reforms from the Nebraska Legislature — part of the nationwide movement to reform modern-day debtors’ prisons — are being implemented. What this project uncovered is a cause for concern.

Observations from a combined 2,300+ bail and sentencing hearings show systemic disregard of laws meant to protect Nebraskans who are struggling financially. They also show continued reflexive practices that perpetuate a modern “debtors’ prison,” where Nebraskans are routinely confined simply because they cannot afford to post cash bail or pay fees or fines.

This publication discusses the legal framework behind bail, fees and fines in Nebraska’s criminal legal system before detailing the court watching project’s findings and offering recommendations for reform. As readers progress through its pages, it is critical to remember that if the system were functioning as the Constitution and state law envision, in most cases, any person assigned cash bail or assessed a court fee or fine would be able to afford it. Reality is a far different story.

## **A Quick Note on Definitions**

The terms “bail” and “bond” are often used interchangeably when discussing release from jail, even in Nebraska statutes. Bond typically refers to a promise to perform a specific duty. In the pretrial context, this is usually a promise to appear at all future court dates. A pretrial bond often includes a cash bail component, which requires an upfront payment of money before an accused person can be released from jail. It is also known as money bail, monetary bail or financial bail. This report uses the term “bail” as the relevant statutes generally use this term when referring to money bonds.



### Why This Matters

“There is no difference between a \$500 bail and \$2 million bail if someone cannot afford it. Any amount of time in jail, pretrial or sitting out a fine, can mean serious collateral consequences, costing someone their job, custody of their children or their home. State senators did the right thing by passing laws to address debtors’ prisons, and now it is time for the courts to get on board. We will see better outcomes for everyone by making sure Nebraskans can return to their families, to their jobs and to the support they need to get their lives on track.”

- ACLU of Nebraska Court Watching Project Lead Demetrius Gatson

# Bail, Fees, and Fines in Nebraska

Every week in Nebraska, hundreds of people go before county judges who set cash bail or impose fees or fines in court hearings that typically last no more than five minutes. High case volume and the resulting quick pace of hearings contribute to significant differences between what the law says compared to how it operates in practice.

## Bail in Principle

Nebraska's Constitution guarantees a broad right to pretrial liberty, which the government may not restrict except in rare specified circumstances, such as when someone is charged with murder, sexual assault or treason and "the proof is evident or the presumption great."<sup>2</sup> The same constitutional provision prohibits excessive bail. Nebraska's constitutional language aligns with federal law on this matter. Congress outlawed debtors' prisons in the 19th century.<sup>3</sup> In 1983, in *Bearden v. Georgia*, the U.S. Supreme Court expanded that legal framework in deciding that incarcerating someone because of their poverty is fundamentally unfair and a violation of the Fourteenth Amendment's Equal Protection Clause.<sup>4</sup>

Nebraska's criminal code directs the release ofailable people pending judgment on their personal recognizance, a written and signed promise without the requirement of posting cash bail, which should include consideration of whether their freedom will reasonably assure their appearance at future hearings and whether or not it could jeopardize the safety of a community and maintenance of evidence.<sup>5</sup>

Recent clarifying statutory language explicitly defines pretrial incarceration as an option of last resort. In 2017, the Nebraska Legislature amended this section to require that judges "consider all methods of bond and conditions of release to avoid pretrial incarceration."<sup>6</sup> Under the current statutory framework, if a judge determines that someone should not be released on personal recognizance, "the judge shall consider the [person's] ability to pay a bond and shall impose the least onerous [condition] that will reasonably assure [their] appearance or that will eliminate or minimize the risk of harm to others or the public at large."

In principle, pretrial detention must be the carefully limited exception to pretrial release.

“In determining which condition or conditions of release shall reasonably assure appearance and deter possible threats to the safety and maintenance of evidence or the safety of victims, witnesses, or other persons in the community, **the judge shall, on the basis of available information, consider the [person’s] financial ability to pay in setting the amount of bond.**”

- Neb. Rev. Stat. § 29-901.01 (emphasis added).

## Bail in Practice

In practice, pretrial confinement is commonplace. As of the writing of this report, people confined pretrial made up a substantial majority of Douglas County and Lancaster County jails’ populations according to reports provided by corrections officials. At the time of this writing, roughly three out of every four people confined in Douglas County Jail and Lancaster County Jail are there pretrial.

The bail process varies between Nebraska jurisdictions but shares certain commonalities. Immediately after law enforcement arrests someone and books them into jail, the person’s bail amount may be determined by a “schedule” that provides set bail amounts for particular offenses. These schedules vary from county to county and are often arbitrary.<sup>7</sup> When the person who was arrested appears before a judge, a prosecutor will recommend a bail amount, which may or may not be similar to the amount set by the schedule; however, the final decision rests with the judge. As this report explains (see Findings), few judges release people on their own recognizance; most instead favor setting a bail amount. Thereafter, the person must generally post 10% of the total bail amount set by the judge. For instance, if \$50,000 is set as bail, the individual must pay \$5,000 to be released from jail.

This reflexive reliance on cash bail is problematic for several reasons. When insufficient consideration is given to someone’s ability to pay, cash bail enables a tiered system of justice where freedom depends on an individual’s financial means, not their likelihood to reappear in court or their likelihood to threaten the community’s safety. This in turn drives mass incarceration in Nebraska and leaves people who are confined pretrial, presumed innocent, sitting in jails.

As an example, imagine two people charged with misdemeanors whose cases are identical in every way, from charge to circumstances. One is wealthy and

the other is financially struggling. In a courtroom where someone's ability to pay is not considered, one person would be able to pay the assessed bail amount and the other would not. As a result, the wealthy person would be less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration.<sup>8</sup> The Nebraskan who cannot afford to pay must bear the brunt of all of these things.

Pretrial incarceration is a shared and persistent concern for stakeholders across the state, including in Douglas and Lancaster Counties where this court watching investigation took place. This concern is evident in the creation of the Lancaster County/Lincoln Justice Council's Pretrial Detention Subcommittee, recent changes to the Douglas County Correctional Center's pretrial release program and the launch of the Harvard Access to Justice study in Douglas County.<sup>9</sup> Moreover, in recent years, Nebraska jail administrators in both counties have publicly supported bail reform, citing the stress that unnecessary incarceration places on correctional staff and its negative impacts on jail programming.<sup>10</sup>

At a statewide level, the Nebraska Judicial Branch's Access to Justice Commission's Committee on Equity and Fairness has also explored this topic. This Committee specifically recognizes that a person's diversity status (e.g., race, ethnicity, gender, disability, English language proficiency or immigration status), can be a barrier to accessing Nebraska's courts and related programs and processes, including bail practices.<sup>11</sup>

"Maybe with those who are less severe - are there options for diverting them out and providing resources to improve their standing in the community and to also reduce the numbers in our facility?"

- Lancaster County Corrections Director Brad Johnson on KOLN, Feb. 2022

## Fees and Fines in Principle

Nebraska's Constitution prohibits the imposition of excessive fines.<sup>12</sup> Additionally, federal case law is clear that the Constitution puts limits on incarceration related to fines. In *Bearden v. Georgia*, the U.S. Supreme Court specifically determined that sentencing courts cannot incarcerate an individual solely because that person cannot pay a fine unless there is evidence that the individual is responsible for the failure and that other forms of punishment were inadequate to meet the state's interest in deterring future crime.<sup>13</sup> Doing so, the court ruled, is a violation of the Fourteenth

Amendment's Equal Protection Clause. In *Williams v. Illinois*, the U.S. Supreme Court once again pointed to the Equal Protection Clause in holding that even if a fine is the most appropriate penalty for a crime, a court may not imprison a person solely because that person lacks the resources to pay the fine.<sup>14</sup>

Recent changes in Nebraska statutes provide structure to help ensure that people are not being confined because they cannot afford to pay a fee or fine. If a person is arrested or brought into custody on a warrant for failure to pay fines or costs, Nebraska state law now entitles that person to a hearing on the first regularly scheduled court date to determine their financial ability to pay those fines or costs.<sup>15</sup> Likewise, if a court or magistrate determines an individual is financially unable to pay fines or costs, state law directs the court to either impose a sentence without monetary punishments, waive the fines and costs, establish a payment plan or order community service for a specified number of hours.<sup>16</sup>

In principle, these Nebraska statutes should prevent people from being confined in jail solely because they cannot afford a fee or fine.

## Fees and Fines in Practice

In practice, incarceration and financial penalties are often linked. When judges find an individual guilty of a misdemeanor crime or an infraction, such as a traffic offense, they often do not sentence that person to jail time — instead, judges may assess a fine as well as court fees and costs. Court fees and costs can vary from \$49 to several hundred dollars depending on the case, and some misdemeanor offenses can carry fines up to \$1,000.<sup>17</sup> Judges are not always required to impose these fines and costs, but because many do, a “pay or stay [in jail]” system has developed. People are routinely asked whether they would like to “sit out” fees and fines in jail at a statutory rate of \$150 credit per day served because they cannot afford the costs.<sup>18</sup>

Of course not all who are sentenced choose to or are able to sit out fines and fees. In those cases, judges may give Nebraskans who choose to pay the fees and fines the option of a payment plan. If the individual is unable to pay and unaware of their right to request an ability to pay hearing, payment plan, community service or waived costs, a judge can issue a warrant for their arrest. That person will be arrested without another hearing in front of a judge and left to sit in jail at the rate of \$150/day toward outstanding fees and fines.

This practice can create significant negative and destabilizing consequences. If a person is arrested unexpectedly, they have no opportunity to make arrangements for their children's care, alert their employer or school, or meet any other current obligations. Any time spent in jail, even just a few days, can have severe collateral consequences.

## Pretrial Racial Disparities

Just as principles and practices differ for people who are financially struggling, there are also well-documented differences in terms of equal access to justice for Nebraskans of color. Racial disparities appear at every point of Nebraska’s criminal legal system and jail pretrial populations are no exception.<sup>19</sup>

The ACLU of Nebraska’s “Unequal Justice” report, published in 2016, found stark racial disparities in jail pretrial populations and a trend in which judges assign Nebraskans of color higher bail amounts than white people for the same offenses.<sup>20</sup> While the ACLU of Nebraska court watching project did not gather race or ethnicity data to evaluate bail amounts by race or ethnicity in this report, recent jail reporting shows continued racial disparities within jail pretrial populations.

As of the writing of this report, Nebraskans of color made up 69% of Douglas County Jail’s pretrial population. Notably, roughly 32% of Douglas County residents are Nebraskans of color. Of all racial and ethnic groups, Black Nebraskans were most overrepresented in Douglas County Jail.

Disparities were also present in Lancaster County Jail. Nebraskans of color made up more than half of Lancaster County Jail’s pretrial population at 53%. By comparison, only roughly 20% of Lancaster County residents are people of color. Black Nebraskans were also most overrepresented in Lancaster County Jail.

The point of elevating this information is to underscore the disproportional outcome court practices have on Nebraskans of color and Black Nebraskans in particular. Incarceration for any amount of time invites collateral consequences that can perpetuate longstanding racial inequities, such as those in employment, education and income.<sup>21</sup> Addressing practices that bolster so-called modern “debtors’ prisons” is a matter of racial justice and additional research is needed to determine just how much of a disproportionate impact race and ethnicity have on the imposition of bail, fines and fees in Nebraska.

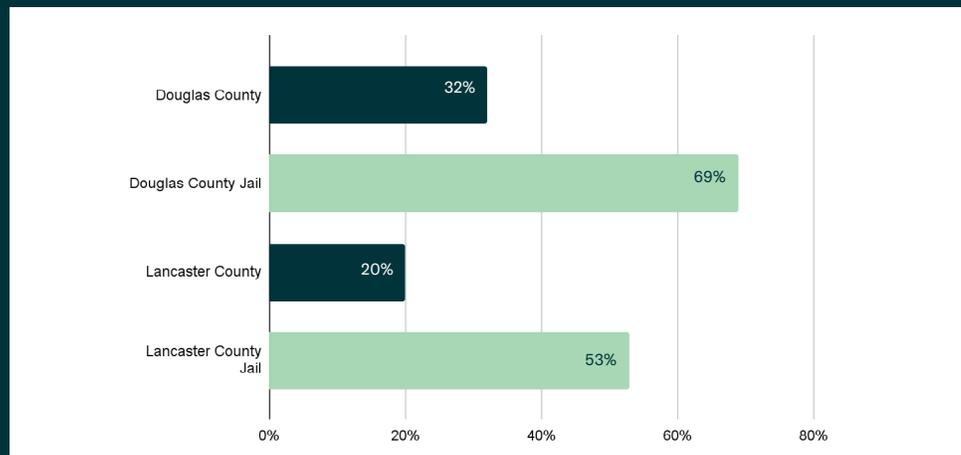


Figure 1: Dark green signifies percent of county populations made of people of color. Light green signifies percent of jail populations made up of people of color. In Douglas and Lancaster County, people of color are significantly overrepresented within the jails’ pretrial populations.

# Methods

This court watching project was the first of its scope in the state. For roughly three months, ACLU of Nebraska staff and interns invested hundreds of hours into observing bail and sentencing hearings in Douglas County and Lancaster County, and recording the process and outcome of each hearing. To enable this intensive data collection, the ACLU of Nebraska hired 24 court watching clerks specifically for this project, consisting of both law students and students studying social sciences with an interest in the criminal legal system.

The court watching team observed 639 bail hearings and 1,700 sentencing hearings in 20 judges' courtrooms for hearings occurring between January 2021 and April 2022. Some of the Lancaster County hearings were watched via provided video recordings. The rest were observed in person or live via online video conferencing. Observers recorded specific behavior on a form and added notes as needed to document anything notable from the hearing, such as remarks someone made or specific provisions a judge applied to conditions of release. The form observers used to record information is attached as Appendix A of this report.

The court watching team organized the information in digital spreadsheets and provided them to Richard Wiener, Ph.D., of the University of Nebraska-Lincoln's Legal Decision Making Lab. Wiener and his team analyzed the raw and anonymized data for themes and statistically significant relationships among the factors observed. The findings were submitted in a comprehensive report to the ACLU of Nebraska team for further discussion and analysis. This report relays the key findings of the project.

# Results

## Judges are Assigning Cash Bail More than Other Options

“Asked if [they] had the ability to pay, [the person] said no, Judge ordered the bond regardless.”

- Observation from May 14, 2021 hearing.

Across hundreds of observed bail hearings, judges assigned cash bail more than any non-monetary option. Of 501 observed cases in which a judge did not find an individual to be dangerous or a flight risk, only 90 of those people, or 18%, were released on their own recognizance.

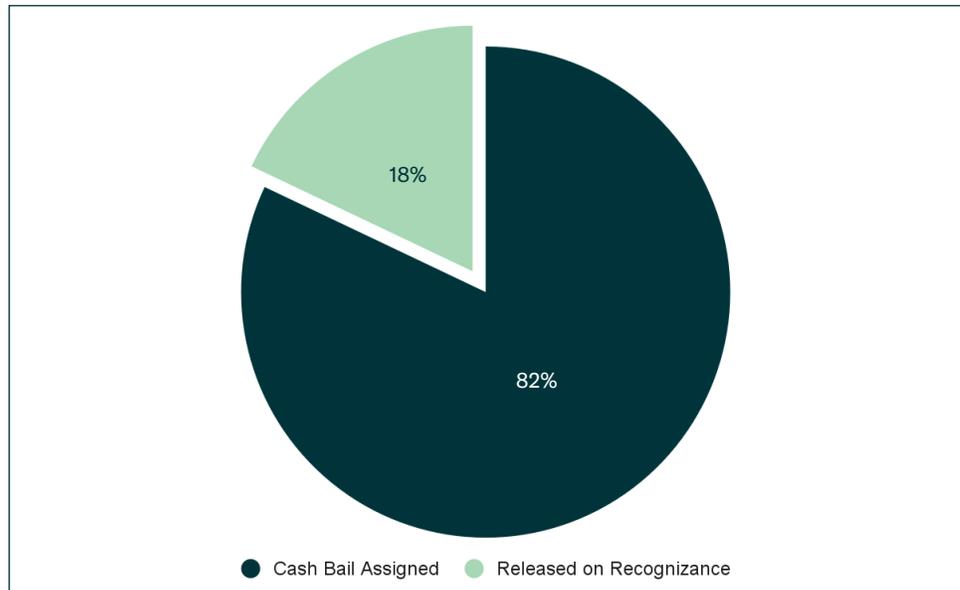


Figure 2: Of 501 cases where judges did not make a finding that an individual was dangerous or likely to abscond, only 90 people were released on their own recognizance.

This approach errs toward incarceration rather than freedom. Money bail should not be imposed unless the court concludes that less restrictive, non-monetary conditions would be ineffective on their own. The presumption should always be in favor of releasing people with the least restrictive conditions needed, and money bail must be considered the most restrictive condition short of detention.

Notably, judges’ tendencies to deny or grant release on personal recognizance differed significantly. Assuming that judges hear a similar range of cases, these rates should have shown some degree of consistency if decisions were based solely on factors such as a person’s likelihood to return for future court dates and any potential public safety risks associated with that person’s freedom.

A set of Multi-Level-Model (MLM) statistical tests confirmed the hypothesis that judges’ individual approaches played an important role in determining whether or not an individual was released on their own recognizance. In fact, MLM tests attributed about 44% of differences in judges’ denial rates to their personal discretion. Other significant factors included prosecutors’ comments, whether a person was charged with a violent crime and whether it was requested that they be released on their own recognizance. There was no significant association between judges’ denial rates and whether or not they found a person was dangerous or likely to abscond.

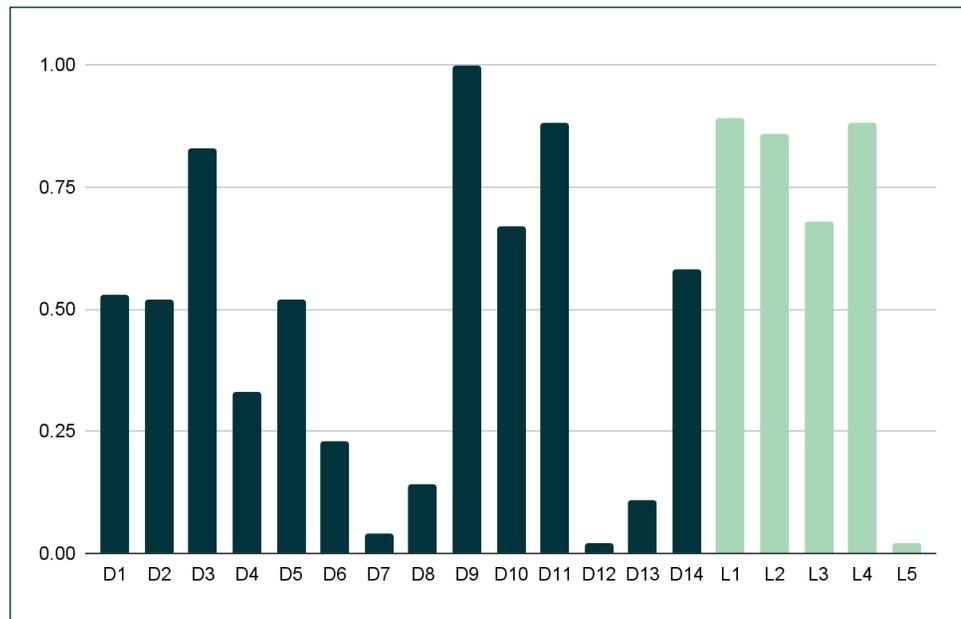


Figure 3: The rate of denying release on recognizance for Douglas County judges (D1-D14) and Lancaster County judges (L1-L5). The higher the bar, the more often the judge denied these requests; the top of the chart signifies a 100% rejection rate.

Notably, analysis also found a marked difference between judges in Douglas and Lancaster County. Statistical modeling shows that a person in Lancaster County is 6.4 times more likely to be denied release on their own recognizance than a person in Douglas County. This study did not explore potential reasons for this difference, but it warrants continued attention.

## Judges are Failing to Ask if Nebraskans can Afford Bail

Because Douglas County and Lancaster County judges are assigning cash bail more than non-monetary options, it is all the more important that they are also taking into consideration a person's financial ability to pay cash bail as required by state law.<sup>22</sup> Alarmingly, this project found numerous hearings in which a judge made no apparent effort to understand someone's ability to pay. In fact, in 39% of all observed bail hearings the judge did not inquire about whether the person had the ability to pay.

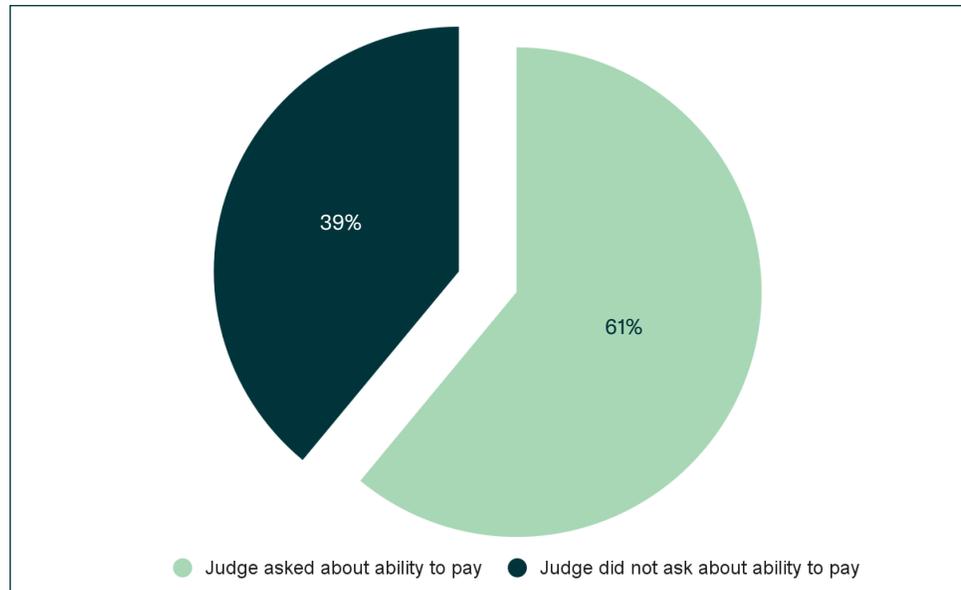


Figure 4: In 39% of observed bail hearings, judges made no inquiry as to a person's ability to pay bail.

Furthermore, in only 38 (18%) of cases in which the judge did not ask about the person's ability to pay did the defense attorney comment on the person's lack of financial ability to pay.

The cases observed often involved nonviolent charges such as possession of a controlled substance, disturbing the peace or public intoxication. An observed February 2021 case helps illustrate this point. A Lancaster County judge assigned a cash bail in the amount of \$2,500 for possession of a controlled substance, meaning the individual would need to post \$250 to be released. This person had just finished a sentence on a prior conviction related to the same drug. The judge did not ask about ability to pay and the public defender did not volunteer any information, meaning the court did not assess ability to pay in order to impose the least onerous condition to ensure public safety and future court appearances as required by statute. A similar situation played out multiple times in front of the same judge in the same month, coincidentally all involving charges related to the same controlled substance, and all failing to meet statute requirements regarding people's ability to pay.

The habitual nature of these hearings highlights just how reflexive some court processes have become. Simply put, it strains belief to argue that someone’s access to \$250 is a determinant factor of whether or not that person will return for a future court date. Moreover, the differences between assigned bail amounts belie any argument that the cash bail system is working optimally or based on best practices. As illustrated below, analysis of the collected data showed the amount of assigned bail varied substantially between judges, suggesting individual judicial discretion played a large role in determining bail, which may or may not be related to a person’s actual ability to pay or their likelihood of returning to court for a later hearing date. The most frequently assigned bail amount was a percentage bond of \$5,000, meaning someone would need to post \$500 to be released.

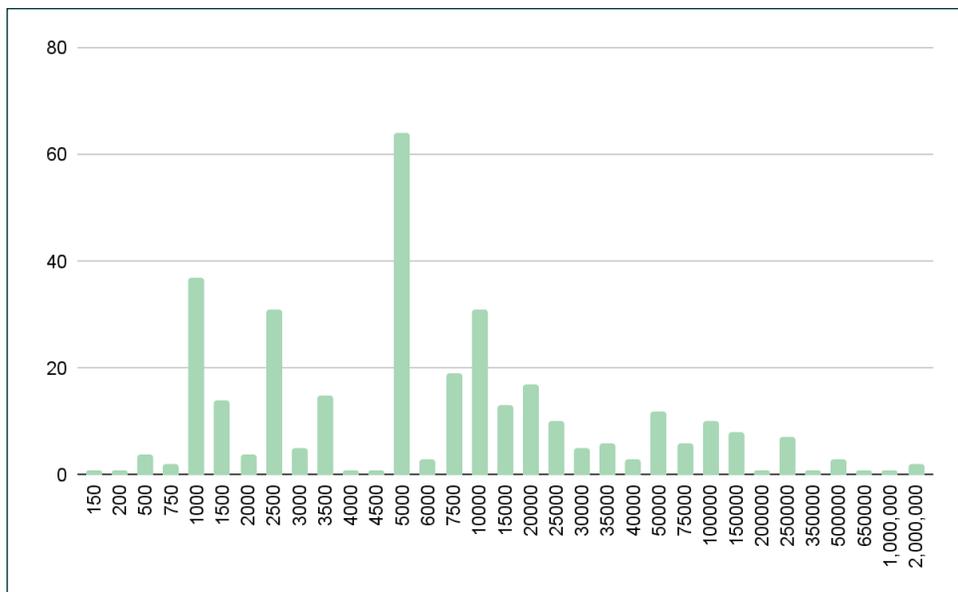


Figure 5: Bail amounts differed substantially. On the horizontal “X” axis are the various bail amounts and on the vertical “Y” axis are the frequency of judgments for each of these amounts. The most frequently assigned bail amount was \$5,000, meaning an individual would need to post \$500 to be released.

Setting aside the question of ability to pay, many of the people’s circumstances raise the question of how the criminal legal system itself can be more fair. For example, individuals arrested for possession of controlled substances, such as those in the observed cases, would be better served in diversion programs and receiving treatment than confined in a county jail. As discussed in the Recommendations section, stakeholders must continue to prioritize diversion and community-led solutions to public health challenges such as mental health crises and addiction.

## Judges are Frequently not Advising Nebraskans of Rights Regarding Fines and Fees

"\$250 fine, gave credit for one day served and allowed to sit out the rest of the fine if she wishes."

- April 21, 2021

Problems within the pretrial system also arise in sentencing. Observations from 1,700 court hearings show that judges are failing to consistently advise Nebraskans of their rights in regard to fines and fees, leading to a system where people are held in jail because they are financially struggling.

As discussed above, Nebraska state law provides for alternatives if a judge determines someone is financially unable to pay fines or costs. These include imposing a sentence without monetary punishments, waiving fines and costs, establishing a payment plan or ordering community service for a set number of hours.<sup>23</sup> The statute puts this requirement on judges, directing that "the court or magistrate shall" choose one of the options. However, in practice, the onus to know about and advocate for this relief often falls on the person facing the charges — individuals who may have little to no understanding of the criminal legal system and their rights and who may be struggling with addiction or other mental health conditions.<sup>24</sup> As Chief Justice Heavican noted in his 2022 State of the Judiciary, on average, over 80% of individuals involved in the system have addiction or other mental health conditions.

Judges should inform people of their rights in every sentencing hearing involving fines and court fees and costs, but court watching clerks found that judges failed to provide these advisements in roughly four out of every 10 hearings. The timing and format of these advisements are also important. When the advisements were provided, judges typically shared them at the beginning of a series of hearings and as part of a general announcement about the proceedings to a large group. Consequently, if someone arrived after the advisement was given, they were not informed of their rights. And as detailed in Figure 6, advisements often did not cover the range of potential options.

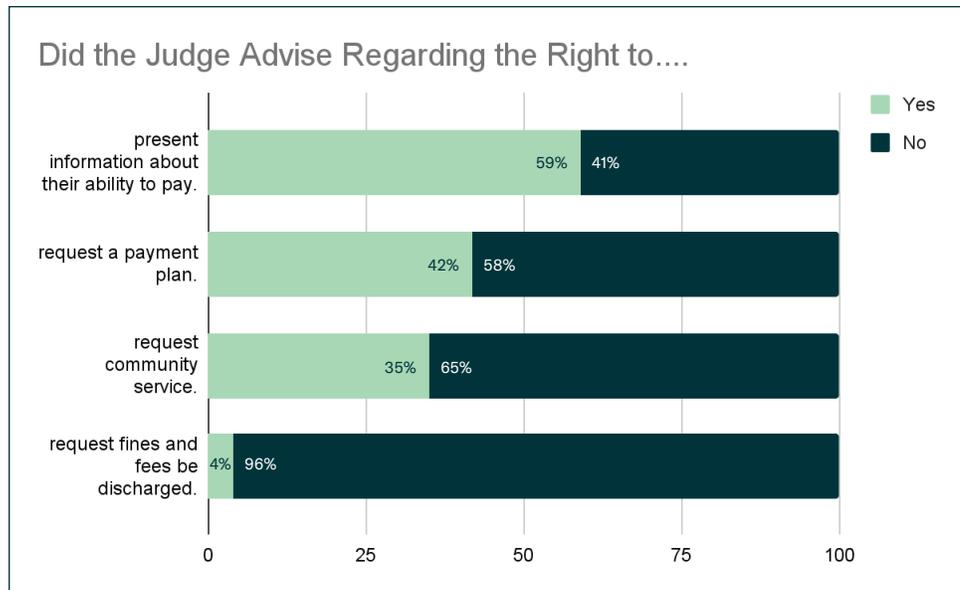


Figure 6: Percent of cases in which a judge advised a person about their rights if they are unable to pay assessed fines or fees. The majority of these advisements, when provided, were presented as part of a general announcement – not individually.

The sporadic nature of these advisements is all the more troubling given a separate finding that judges often did not receive information about a person’s ability to pay before imposing a fine. In fact, judges received information about the person’s ability to pay a fine before imposing that fine in only 36% of observed cases.

This, however, does not mean that no information was shared. Often when an imposed fine was beyond someone’s financial means to pay, the fine would open up a conversation about alternatives. In total, 64% of people being sentenced in observed hearings ended up making some comment about an inability to pay.

# Recommendations

"[The man] had posted bond but wanted some released to pay for medicine. He indicated that he had no money to pay. State opposed, but judge converted bond to PR bond, with condition that he do[es] not contact the victim. \$270 released to [him] so that he could pay for his medications."

- Feb. 11, 2021

As highlighted in the above observation, our current system creates additional hardships for those who already struggle. In this case, it is fortunate the judge rejected the prosecutor's attempt to deny this request.

Ultimately, each day that someone is in jail is a day where they may face new destabilizing consequences. Beyond the human costs, unnecessary pretrial incarceration is simply not a wise use of public resources. Correctional budgets remain significant expenses for county and state budgets,<sup>25</sup> so much so that the Nebraska Legislature recently considered a proposal from then State Senator Mike Flood that would have provided a public list of price tags for every prison sentence.<sup>26</sup>

This report offers a series of recommendations to achieve a more just system, one where freedom does not depend on how much money an individual possesses. By adopting these recommendations, stakeholders would help better protect Nebraskans' rights, save taxpayer dollars and mitigate some of the most harmful collateral consequences of incarceration. Many, but not all, of these recommendations come from the ACLU's 2019 report "A New Vision for Pretrial Justice in the United States."<sup>27</sup>

## Judges Must Fully Follow the Letter and Intent of the Law

In the context of setting cash bail and imposing fees and fines, one of our most pressing problems lie not with the law itself, but rather with judges' inconsistent adherence to the law. In terms of pretrial incarceration, judges should set release on personal recognizance unless there is a reason not to and use the least restrictive conditions to guarantee future appearance. Likewise, every bail hearing should include an individualized assessment of someone's ability to pay bail. In sentencing hearings, judges should replace general advisements with individualized advisements and ensure that these

advisements include full discussion of the options that are available to people who are financially struggling.

On a related note, judges should consider a person’s “ability to pay” to mean their “*present* ability to pay *the full amount*” of any bond that is set.<sup>28</sup> This can be measured as the amount the person could reasonably pay within 24 hours, excluding any public benefits and any income up to the federal poverty level. In other words, an individual should not be deemed able to pay cash bail (therefore making the bail “affordable”) by borrowing money from others. Likewise, this assessment should not contemplate prospective employment or selling personal or real property that would significantly hinder an individual’s ability to meet their needs.

## Adopt a Bench Card

Simple tools and processes, such as checklists and standardized forms, can assist judges in conducting careful individualized assessments, encourage release on recognizance and guarantee that cash bail, if set, is affordable. The courts already provide similar resources for juvenile justice and family law matters.<sup>29</sup> A bench card for bail hearings and sentencing hearings is overdue and every effort should be made to move this recommendation from exploration to implementation. Adopting a bench card fits well with the Access to Justice Commission’s guiding principles, as mentioned in Chief Justice Heavican’s most recent State of the Judiciary address — namely ensuring that all people have equal access to court services regardless of income and that their cases are resolved fairly and quickly.<sup>30</sup> To help expedite implementation of this recommendation, the ACLU of Nebraska has developed a model bench card that has been shared with court officials.

## Judicial Training

The Office of Judicial Branch Education is well poised to lead on judicial training related to these topics and such training should be offered regularly. Relevant resources to help inform this training are readily available. Over the last two years, the ACLU of Nebraska has developed pro se legal forms in multiple languages for community members and organized Know Your Rights training events on these topics for community partners. Judicial training should also cover the impact of personal discretion in bail setting and sentence hearings. There are tools available to assist evaluators in making more objective judgments with limited information. Judges would benefit from learning more about best practices in making judgments under uncertainty.

## Embrace Mandatory and Presumptive Release

Policymakers have a role to play in alleviating stress on the system and preventing unnecessary pretrial incarceration. They can do so by creating a wide eligibility net for mandatory and presumptive release in lieu of booking, effectively eliminating cash bail for certain offenses. Many of the state’s misdemeanors could qualify for this method of release, and those who are arrested for those charges should be required only to appear for necessary court appearances and to cooperate with the legal process. Moreover, as county court systems work to expand technological offerings, court date reminders should be offered to all who are released, regardless of the mechanism of release (i.e., citation or release on conditions).

## Better Reporting

One way to better manage the role of discretion that judges and prosecuting attorneys exercise in this system would be to make their decisions transparent and easy to access. The raw data on every jail booking and the outcomes of every court appearance exist but remain unanalyzed and largely inaccessible to the public. For example, jail booking data must be requested from many of our county jails and court records are accessible only via Nebraska’s JUSTICE system and require a paid subscription to access.

The Nebraska Judicial Branch should promote greater transparency by regularly analyzing and publishing existing data, including judges’ individual rates of assigning bail versus release on recognizance, racial disparities in bail practices and any other broad trends that might be helpful in identifying local practices in need of reform.

Likewise, Nebraska state senators should pass measures encompassed in 2021’s Prosecutorial Transparency Act (LB151), introduced by Sen. Adam Morfeld. This bill proposed uniform information transparency requirements for prosecutors’ offices around the state, including reporting of demographics and how prosecutors process, charge and resolve criminal cases. This reporting would help demonstrate prosecutors’ outsized role in the criminal legal system and perhaps encourage diversion to reduce the state’s reliance on habitual mass incarceration.

## End Cash Bail

Any newly adopted training and reforms must be considered stepping stones on the path to ending cash bail. As this report explained, courts in Nebraska’s most populous counties are failing to consistently follow laws meant to prevent debtors’ prisons. Anything short of complete compliance with these statutes creates an unjust situation where people are being confined while awaiting

trial simply because they cannot afford to purchase their freedom. Ending cash bail and focusing judges' pretrial decisions on risk instead of access to wealth will lead to improved community safety and make our pretrial system more fair.

State senators should work swiftly to build consensus around the provisions found in Sen. John Cavanaugh's LB636,<sup>31</sup> which would have eliminated cash bail and instead required courts to consider a variety of factors along with an individual's potential flight risk and apparent risk to the community when determining pretrial release — this includes the individual's employment history, obligations to support dependents or family members, community involvement, ongoing need for medical care and enrollment in an educational program. The bill would have also appropriately prohibited consideration of an individual's lack of residence, unrelated criminal history, or assertion of the right to remain silent or denial of consent to a search.

Broadly speaking, ending cash bail must be paired with reforms that promote decriminalization and diversion, strong due process protections, the expansion of the right to counsel during pretrial proceedings, constitutional principles and fundamental fairness. A detailed blueprint for these reforms can be found in "A New Vision for Pretrial Justice in the United States."



# Conclusion

In a time when seemingly any public policy conversation can often turn divisive, criminal legal reform presents an opportunity for meaningful, consensus-driven work. Polling from 2020 shows Nebraskans from across the political spectrum are widely supportive of more work in this area. When asked about their opinion on diversion and incarceration, 80% of respondents agreed that too much money is currently being “wasted locking up people in prisons and jails who should be receiving mental health or addiction services.”<sup>32</sup>

We see similar cross-party consensus nationally. Just a few years ago, Senator Rand Paul and Vice President Kamala Harris penned a joint op-ed for the New York Times announcing a cosponsored bill that would support states’ efforts to reform bail.<sup>33</sup> “Whether someone stays in jail or not is far too often determined by wealth or social connections, even though just a few days behind bars can cost people their job, home, custody of their children — or their life,” they wrote. And they are exactly right. The Pretrial Integrity and Safety Act, unfortunately, has yet to be passed and its most recent iteration remains in committee.<sup>34</sup>

While federal progress remains slow, states and local governments are leading the way. For example, ACLU negotiations in Shelby County, Tennessee, recently led to an agreement that will create one of the fairest bail systems in the nation. It is expected to go into full effect in early 2023.<sup>35</sup> The new system will feature a new bail hearing courtroom; individualized bail hearings with counsel no later than three days after a person’s arrest; examination of a person’s financial circumstances prior to any decision assisted with a bail calculator; court reminders; and imposition of cash bail only as a last resort.

Closer to home in our sister state of Kansas, a Kansas Supreme Court Pretrial Justice Task Force has recently undergone a two-year study of the topic<sup>36</sup> and put forward 19 recommendations ranging from judicial education to statutory changes. And just across the Missouri River in Iowa’s most populous county, prosecutor Kimberly Graham just won election as Polk County Attorney by double digits on a campaign pledge to stop requesting cash bail for nonviolent, low level offenses.<sup>37</sup>

Many Nebraska stakeholders are working on a multitude of fronts to explore different aspects of this issue. Progress actually addressing these issues, however, has lagged since the Nebraska Legislature’s work in 2017. This report along with concurrent efforts should encourage stakeholders at every level to reinvigorate their efforts and begin immediately implementing changes that will better protect the civil rights and civil liberties of Nebraskans who are financially struggling. Freedom should not depend on how much money an individual has or has access to. It is the responsibility of everyone involved in Nebraska’s criminal legal system to ensure that our system is truly just for all.

# Appendix A: Bail & Fines Reform Data Sheet

Observer name:

Judge:

Courtroom/date/time:

**CASE NUMBER:** CR - \_\_\_\_\_

**DEFENDANT NAME:** \_\_\_\_\_

**Defendant in custody?** \_\_\_ Yes \_\_\_ No \_\_\_ Unknown

**Charges:**

- Non-violent offense** (Disturbing the Peace, Trespassing, Public Intox. or similar)
- Property offense** (Theft, Criminal Mischief)
- Possession of Drugs**
- Possession of Drugs with Intent to **Distribute**
- Violent offenses** (assault, domestic violence, terroristic threats)

**BOND DETERMINATION/REVIEW**

(normally applicable if **felony** or Defendant Pleads **Not Guilty**)

**Was the Public Defender's Office Appointed?** \_\_\_ Yes \_\_\_ No \_\_\_ Private Attorney \_\_\_ Unknown

**Prosecutor's request/comments re bail?**

Requests cash bail. If specific amount: \$ \_\_\_\_\_ \_\_\_ Yes \_\_\_ No \_\_\_ Inaudible/Unknown

Agrees to ROR/Personal Recognizance (Signature Bond) \_\_\_ Yes \_\_\_ No \_\_\_ Inaudible/Unknown

**Public Defender comments:**

Indicates Defendant indigent or asserts inability to pay cash bail \_\_\_ Yes \_\_\_ No  
\_\_\_ Inaudible/Unknown

Requests ROR (Signature Bond) \_\_\_ Yes \_\_\_ No \_\_\_ Inaudible/Unknown

Request consideration of alternative to cash bail (Third party custodian, travel, association, or living restriction; pre-trial services program (PTS)) \_\_\_ Yes \_\_\_ No \_\_\_ Inaudible/Unknown

**Defendant's Comments:**

- No comments
- Attempted but silenced by \_\_\_ Judge or \_\_\_ defense counsel
- Interpreter provided if necessary
- Describe any comments re financial ability/indigence:

\_\_\_\_\_

**Judge's Consideration of Ability to Pay Cash Bail**

Made finding of danger to the public or risk of non-appearance \_\_\_ Yes \_\_\_ No \_\_\_ Inaudible/Unknown

Inquired about the defendant's financial ability to pay bail \_\_\_ Yes \_\_\_ No \_\_\_ Inaudible/Unknown

Inquired about, discussed, or considered alternatives (such as third party custodian, travel, association/no contact or living restrictions, pretrial services program (PTS)). \_\_\_ Yes \_\_\_ No  
\_\_\_ Inaudible/Unknown

**Bail Outcome:**

ROR/Personal Recognizance \_\_\_ Yes \_\_\_ No \_\_\_ Inaudible/Unknown

Cash amount: \_\_\_\_\_ (Be clear about 10% provision, i.e. "\$5,000/500") \_\_\_ Inaudible/Unknown

Other conditions (Describe): \_\_\_\_\_

Observer name:

Judge:

Courtroom/date/time:

**CASE NUMBER:** CR - \_\_\_\_\_ **DEFENDANT NAME:** \_\_\_\_\_

**SENTENCING AND IMPOSITION OF FINES**

(Applies in misdemeanor case if Defendant pleads **Guilty** or in custody for failure to pay)

**Was Defendant picked up on warrant for failure to pay a fine?** \_\_\_ Yes \_\_\_ No \_\_\_ Inaudible/Unk

**Was the Public Defender's Office Appointed?** \_\_\_ Yes \_\_\_ No \_\_\_ Inaudible/Unk

**Judge's Pre-Sentence Advisement**

Def't informed of right to **present information** re: ability to pay? \_\_\_ Yes \_\_\_ No \_\_\_ Inaudible/Unk

Def't advised that if unable to pay a fine, **may request community service**? \_\_\_ Yes \_\_\_ No \_\_\_ Inaudible/Unk

Def't advised that if unable to pay a fine, they may **discharge the fine**? \_\_\_ Yes \_\_\_ No \_\_\_ Inaudible/Unk

Def't advised that if unable to pay a fine, they may be set on a **payment plan**? \_\_\_ Yes \_\_\_ No \_\_\_ Inaudible/Unk

Judge set a **separate** hearing set to determine ability to pay (this is unlikely) \_\_\_ Yes \_\_\_ No \_\_\_ Inaudible/Unk

Were these advisements given individually? \_\_\_ Yes, \_\_\_ No \_\_\_ Inaudible/Unknown

Were these advisements given at the beginning of all of the hearings? \_\_\_ Yes, \_\_\_ No \_\_\_ Inaudible/Unk

**Prosecutor's request/comments re sentence**

Requested specific fine amount: \_\_\_ Yes If so, \$ \_\_\_\_\_ \_\_\_ No \_\_\_ Inaudible/Unknown

Acknowledged plea agreement for a specific fine amount: \_\_\_ Yes If so, \$ \_\_\_\_\_ \_\_\_ No \_\_\_ Inaudible/Unknown

Requested jail instead of fine \_\_\_ Yes \_\_\_ No \_\_\_ Inaudible/Unknown

**Public Defender comments:**

Acknowledged plea agreement for a specific fine amount: \_\_\_ Yes If so, \$ \_\_\_\_\_ \_\_\_ No \_\_\_ Inaudible/Unknown

Indicated indigent or assert inability to pay a fine \_\_\_ Yes \_\_\_ No \_\_\_ Inaudible/Unknown

Made no comments regarding ability to pay: \_\_\_ Yes \_\_\_ No \_\_\_ Inaudible/Unknown

Indicated Defendant wanted to "sit it out": \_\_\_ Yes \_\_\_ No \_\_\_ Inaudible/Unknown

Asked to do community service instead of pay: \_\_\_ Yes \_\_\_ No \_\_\_ Inaudible/Unknown

Asked to have more time to pay: \_\_\_ Yes \_\_\_ No \_\_\_ Inaudible/Unknown

**Defendant's comments:**

No comments \_\_\_ Yes \_\_\_ No \_\_\_ Inaudible/Unknown

Interpreter provided if necessary \_\_\_ Yes \_\_\_ No \_\_\_ Inaudible/Unknown

Describe any comments re financial ability/indigence: \_\_\_\_\_

**Judge's Consideration of Ability to Pay**

Judge received information regarding income, assets, debts or other matters affecting **ability to pay** before imposing fine? \_\_\_ Yes \_\_\_ No \_\_\_ Inaudible/Unknown

Judge acknowledged or considered alternatives – payment plan or community service or discharge of fine? \_\_\_ Yes \_\_\_ No \_\_\_ Inaudible/Unknown

Judge's Order: \_\_\_\_\_

# Appendix B: Instructions & Form to Discharge

## INSTRUCTIONS FOR COMPLETING THE REQUEST TO DISCHARGE FINES, FEES, AND COURT COSTS

If a court finds someone guilty of a crime, they can order that person to pay court fines, fees, and costs related to the case. The court cannot jail someone for their inability to pay these fees. To prevent this from happening, the judge should receive information about a person's ability to pay a fine or fee and, consider alternatives, such as allowing someone to do community service instead of paying or to let them pay a fine in installments. Alternatively, the judge may decide that a person does not have to pay any amount.

The purpose of this request form is to show the judge in your case that you are unable to pay the court ordered fees and fines related to your criminal case because you cannot afford to do so.

It is important you are truthful in disclosing your income and expenses on your request because you are swearing to the court that the information is true to the best of your knowledge.

## WHAT TO DO WITH THE FORM

If there is a court date currently scheduled, you may present the completed form to the judge at that time. If there is no court date currently scheduled, you will need to file the completed form with the Clerk of the Court. The Clerk is located at the courthouse where your criminal case was filed. The Clerk will give the request to the judge who will then set a hearing on your request. The courthouse will mail you a notice of the hearing, so make sure the court has your current home address. If you miss your hearing, the court will dismiss your request. If you cannot make the hearing, you must let the court know as soon as possible.

## FOR MORE INFORMATION

If you have any general questions about filling out the request form, you may contact [gethelp@aclunebraska.org](mailto:gethelp@aclunebraska.org) or another community support agency for more information.

## DISCLAIMER

Please understand that, by providing these instructions and request forms, the ACLU of Nebraska has not entered into an attorney-client relationship with you and has not undertaken any obligation to protect or advance your legal claims.

IN THE \_\_\_\_\_ COUNTY COURT, NEBRASKA  
(Name of County)

THE STATE OF NEBRASKA, ) CASE NO. \_\_\_\_\_  
)  
)  
Plaintiff, ) **REQUEST TO DISCHARGE OR**  
) **ORDER ALTERNATIVE TO**  
) **PAYMENT OF FINES AND COSTS**  
)  
v. )  
)  
\_\_\_\_\_, )  
(Your Full Name) )  
)  
Defendant. )  
)

I am requesting the Court conduct a hearing and to either discharge the payment of fines or costs, or to order alternative arrangements, under the authority of Neb. Rev. Stat. §§ 29-2206(c) and/or 29-2412(c) (Amended 2017).

In support of my request, I swear under penalty of perjury as follows:

1. I am unable to pay the fines or costs that I owe in this case without harming my financial ability to provide economic necessities for myself or my family.
2. My monthly sources of income are as follows:
  - a. Amount of money earned through work/employment.....\$ \_\_\_\_\_
  - b. Amount received per month from government assistance programs (including food stamps (SNAP), Supplemental Security Income (SSI), Aid to the Aged, Blind and Disabled, Temporary Assistance to Needy Families (TANF), General Assistance (GA), or similar programs). .....\$ \_\_\_\_\_
  - c. Other Income (specify) \_\_\_\_\_ .....\$ \_\_\_\_\_
3. The value of my current goods/valuables/belongings are as follows:
  - a. Cash in your possession .....\$ \_\_\_\_\_
  - b. Money in bank accounts .....\$ \_\_\_\_\_

c. Value of property or real estate.....\$ \_\_\_\_\_

d. Value of any cars you own.....\$ \_\_\_\_\_

4. My current monthly debt consists of:

a. Rent not covered by housing subsidies.....\$ \_\_\_\_\_

b. Electricity, gas, and water not covered by energy assistance benefits.....\$ \_\_\_\_\_

c. Food purchased without food stamps or food assistance.....\$ \_\_\_\_\_

d. Automobile loan payments.....\$ \_\_\_\_\_

Balance of loan:.....\$ \_\_\_\_\_

e. Court-ordered child support.....\$ \_\_\_\_\_

f. Clothing and other bills  
(*may include phone bills, car insurance, gasoline, transportation costs, laundry, student loans, payday loans, and credit card bills*).....\$ \_\_\_\_\_

5. I understand the Court could order me to make installment payments toward any fines or costs imposed. Regarding my ability to pay, I hereby state that I (*choose one*):

a.  Can pay \$ \_\_\_\_\_ per month towards my fines or costs.

b.  Cannot pay any amount towards my fines or costs without harming my financial ability to provide economic necessities for myself or my family.

6. I understand the Court may also enter an Order requiring me to perform community service instead of paying a fine. I (*choose one*)  have  have not been determined to be disabled in a way that might affect my ability to perform community service.

7. I (*choose one*)  do  do not request that an attorney be provided at no cost for purposes of this request.

I hereby declare under penalty of perjury the above information is true and correct.

Dated this \_\_\_\_ day of \_\_\_\_\_, 20 \_\_.

\_\_\_\_\_  
Defendant (Your) Signature

# Appendix C: Court Watch Data Analysis

See [aclunebraska.org/bail-analysis](http://aclunebraska.org/bail-analysis) for the entire report.

## ACLU Court Watch Data Analysis

Richard L. Wiener, PhD.

August 5, 2022

The Nebraska ACLU staff attended and observed 639 bail hearings in Eastern Nebraska (Douglas and Lancaster Counties) from January 31, 2022, through April 28 2022 and they attended and observed 1700 sentencing hearings during the same time period. The ACLU team observed 20 judges conducting both types of hearings and recorded their responses in a forced choice summary sheet with some space allocated for comments to specific factors. The ACLU team collected and organized the data in excel spreadsheets, which Dr. Wiener and his team downloaded into a statistical database for purposes of analysis. This document summarizes the results of this Court Watch Study in five sections:

Section I: Description of the Bail Database

Section II: Description of the Sentencing Database

Section III: Analysis of ROR decision for the bail data (i.e., the judge's decision to release or not to release an offender on her or his own recognizance)

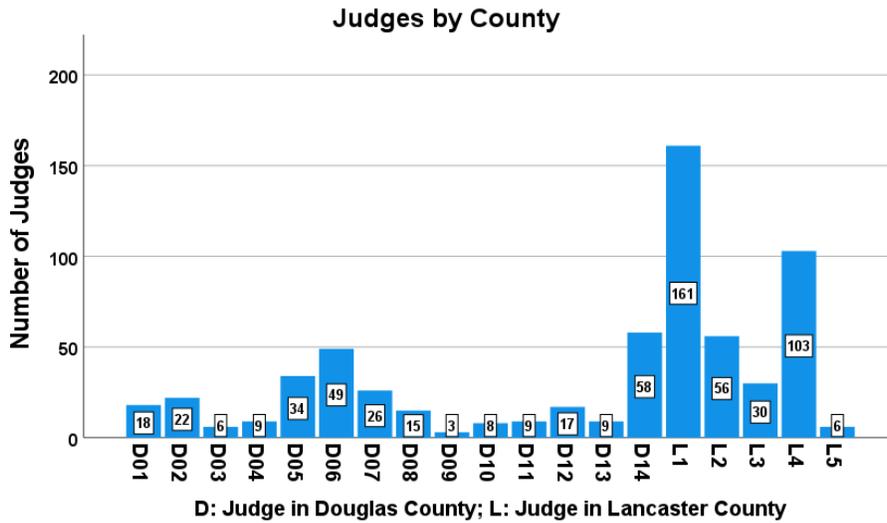
Section IV. Analysis of alternative penalty decision for sentencing data (i.e., the judge's decision to consider or not to consider alternative penalties instead of fine)

Section V: Conclusions and Recommendations

### **Section I: Description of the Bail Database**

#### **Structural Level Bail Data**

The ACLU team observed 356 bail hearings that 5 judges conducted in Lancaster County, Nebraska, and 283 which 14 judges conducted in Douglas County, Nebraska. As shown in Figure 1 there was a great deal of variability in the number of hearings that the ACLU staff observed with each judge in Douglas County (high = 58, low = 3). There was even greater variability of in the number of bail hearings that the ACLU staff observed with each of the five judges in Lancaster County (high = 161, low = 6). Thus, while the results reported below generalize well at the county level, they are less representative of individual judges. Conclusions drawn about Judges that contributed fewer than 15 hearings are not as reliable as those drawn about judges that contributed larger numbers of hearings. Figure 1 shows that the generalizations about individual Lancaster County judges, except L5, are likely more reliable than those about individual Douglass County Judges, except D1, D2, D5, D6, D7, and D12 for whom there are more than 15 observed bail hearings.



**Figure 1: The Number of observed bail hearings that judges conducted in Douglas and Lancaster Counties.**

Figure 2 shows that the number of bail hearings observed was greater in Lancaster than in Douglas County, despite the fact that the ACLU team observed fewer judges in the former than in the latter. Together Figures 1 and 2 describe the structural level of bail hearings grouped by judge and by County (level 2). The remaining figures and charts in this section describe the characteristics of individual bail hearings (level 1).

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