

# RETHINKING CASH BAIL IN CASS COUNTY

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## ABSTRACT

Each night in North Dakota, thousands of people sit in jail for one reason only—they're too poor to get out. They're neither dangerous nor a flight risk, they simply don't have enough money to pay their cash bail. And these amounts are usually low, rarely exceeding \$5,000.00. With the use of a bail bondsman, that means freedom costs \$500.00 or less. Unable to pay, people instead remain in custody and wait for their day in court, which can take weeks or even months. By contrast, people wealthy enough to afford their cash bail are promptly released and able to go back to their regular lives while their cases progress.

Not only does this create a legal caste system that rewards the rich and punishes the poor, it also presents two public policy concerns. First, it severely disrupts still-innocent peoples' lives. And second, it's very expensive for taxpayers. This article focuses on the second concern—the cost of jailing people pretrial. North Dakota is paying millions per year to keep people in custody, but is it getting any benefit for its money? This article examines costs incurred at one North Dakota facility—the Cass County Jail in Fargo.

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## I. INTRODUCTION

This article has four parts.

- (1) The history of cash bail. Cass County, by judicial order, keeps people in custody primarily because they can't afford their bail amount.<sup>1</sup> This section discusses the origins of cash bail and its rise to prominence in the United States.
- (2) The cost of cash bail. There are two ways to think about the cost of cash bail—the simple way or the nuanced way. The simple way is to multiply the number of people in jail by their daily cost to the jail. The nuanced way is to think beyond that. With the help of Captain Andy Frobis, the Cass County Jail's administrator, this section attempts to quantify the "true cost" of cash bail to Cass County.
- (3) The case for cash bail. There are two main arguments for cash bail: (1) it prevents people from skipping their court date; and (2) it keeps the public safe. This section discusses whether the cash bail system actually achieves these goals and how both would be addressed if a different system was implemented.
- (4) The solution to cash bail. Unlike most jurisdictions, Cass County has a ready-made solution to cash bail—its Community Supervision Unit ("CSU"). The CSU allows people who can't afford their bail to be released in certain circumstances. To date, the program has achieved impressive results and could be scaled to accommodate more participants. This section discusses what that might look like.

The article concludes with a summary of findings.

## II. THE HISTORY OF CASH BAIL

The goal of this section isn't to provide a comprehensive literature review of the cash bail system.<sup>2</sup> Instead, it's simply to give the reader a basic understanding of the system's origins and its rise to prominence.

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1. In fairness, not all people remain in custody because they can't afford bail. Some do so because they have holds in other jurisdictions, so even if they paid their bail in Cass County, they wouldn't be released. Still others choose to remain in jail, despite being able to afford bail, to accrue time in hopes of a plea bargain down the road. However, these examples are the exception, not the rule, and the vast majority of time people remain incarcerated because they can't afford their bail.

2. For that, Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*, NAT'L INST. OF CORRECTIONS (Sept. 2014), <https://s3.amazonaws.com/static.nicic.gov/Library/028360.pdf>, is the seminal text.

### A. THE ORIGINS OF CASH BAIL

While the use of bail can be traced to ancient Rome, its modern understanding “derives primarily from English roots.”<sup>3</sup> The concept was created by Germanic tribes that migrated to Britain and began as an alternative to families settling their disputes with violence.<sup>4</sup> It worked like this:

If Person A harmed Person B, the old way was that Person B’s family would retaliate against Person A’s family until one family killed the other. Under the new system, by contrast, Person A agreed to pay Person B a set sum of money to avoid Person B’s retribution. Because the amount depended on the harm, it was sometimes too much to pay at once. So Person A would promise to make the payment to Person B over time. As long as Person A made regular payments, Person B agreed to not seek retribution.<sup>5</sup>

At its core, the original bail system was based on the idea of personal surety (the promise to pay) using an unsecured bond (the promise wasn’t secured by collateral).<sup>6</sup> This changed over time, however, and moved toward the cash bail system we are familiar with today.<sup>7</sup>

The first major shift occurred when the Normans arrived in Britain.<sup>8</sup> They brought with them the idea of the state dealing with crimes rather than families settling disputes privately.<sup>9</sup> As a result, jails were created to hold people charged with crimes until their trial.<sup>10</sup> This often took a long time, so the state began allowing people to be released to the custody of “responsible persons,” called “sureties,” until trial.<sup>11</sup> The surety was tasked with ensuring the individual would show up for court.<sup>12</sup> Importantly, the service was free—the released person paid nothing and the surety received nothing.<sup>13</sup> This marked a fundamental shift in the purpose of bail: “Whereas the purpose of the original bail setting process . . . was to avoid a blood feud between families while the accused met his obligations, the use of . . . jails meant that the purpose of bail would henceforth be to provide a mechanism for release.”<sup>14</sup>

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3. *Id.* at 21.

4. *Id.*

5. *Id.* at 21-22.

6. *Id.* at 23.

7. *Id.*

8. *Id.* at 24.

9. *Id.*

10. *Id.*

11. *Id.*

12. *See id.*

13. *See id.*

14. *Id.* at 24-25.

Despite minor changes over time, this system in which people were released to the custody of a surety worked well for hundreds of years.<sup>15</sup> Money never entered the equation because sureties accepted the responsibility out of a sense of duty and honor, not a desire to make money. Eventually, however, both Britain and the newly formed America began to run out of sureties in the 1800s.<sup>16</sup> This was because the number of people charged with crimes outpaced the number of “responsible persons” that could serve as sureties.<sup>17</sup> As a result, fewer and fewer otherwise qualified people were being released pre-trial.<sup>18</sup> At this point, the two countries took divergent approaches with respect to bail.<sup>19</sup> In Britain, like most of the rest of the world, they moved away from sureties altogether.<sup>20</sup> In America, however, not only did they continue using sureties, they actually transformed the system from one of personal sureties using unsecured bonds to one of commercial sureties using secured bonds.<sup>21</sup>

### B. CASH BAIL’S RISE TO PROMINENCE

The first reason cash bail gained traction in the United States was its transformation into a money-making endeavor.<sup>22</sup> Originally, America’s reform efforts were pure—they were meant to figure out a way to release otherwise releasable people who simply couldn’t find someone to act as a surety.<sup>23</sup> Unfortunately, they had the opposite of their intended effect.

While America may have purposefully moved toward a commercial surety system from a personal surety system to help releaseailable defendants, perhaps unwittingly, and certainly more importantly, it moved to a secured money bail system (requiring money to be paid before release is granted) from an unsecured system (promising to pay money only upon default of obligations).<sup>24</sup>

Once a monetary incentive was introduced, the secured bail system exploded. A cottage industry sprung up where sureties acted out of a desire to get rich, not a sense of duty and honor as before.<sup>25</sup> And people charged with crimes, who were desperate to be released, were willing to pay. The shift in the surety system was so pronounced that even the U.S. Supreme Court took

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15. *See id.* at 25-26.

16. *Id.* at 26.

17. *See id.* at 19, 26.

18. *See id.* at 26.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

note. In a 1912 case, the Court described the new commercial surety system this way: “The interest to produce the body of the principal in court” has become “impersonal and wholly pecuniary.”<sup>26</sup>

The second reason cash bail flourished in America was due to changes in the “bail/no bail” dichotomy.<sup>27</sup> In the beginning, the bail system was based on two options: (1) release to a surety if the person’s crime wasn’t serious; or (2) no release if the person’s crime was serious.<sup>28</sup> But when the number of sureties began to run out, this neat, either-or system was disrupted.<sup>29</sup> What began happening was that people who qualified for release couldn’t actually be released because there was no surety to accept them. So another surety mechanism had to be created—money.<sup>30</sup> Now, instead of release being based on crime type, it was based on an amount of money.<sup>31</sup> At first glance, this seemed a win-win situation for both the accused (who wanted release) and the person providing the surety for release (who wanted profit). However, as the money bail system took over, release determinations were no longer based on the seriousness of the person’s crime, but instead their ability to pay the money required.<sup>32</sup> This led to the paradox facing the system today—the pretrial jailing of people who haven’t committed serious crimes, and who deserve to be released, because they can’t afford to pay the prerequisite amount of money due.<sup>33</sup> Together, these two factors have resulted in “an increase in the detention ofailable defendants over the last 100 years.”<sup>34</sup>

### III. THE COST OF CASH BAIL

Before beginning this section’s analysis, two ground rules must be established. First, the analysis will be limited to people with cash bails of \$1,000.00 or less.<sup>35</sup> Second, the analysis will assume that there is always at least 48 people in the Cass County Jail with cash bails of \$1,000.00 or less.

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26. *Leary v. United States*, 224 U.S. 567, 575 (1912).

27. *Schnacke*, *supra* note 2, at 27.

28. *Id.* at 27-28.

29. *Id.* at 32.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 32-33.

34. *Id.* at 26. For *Schnacke*’s incisive summary of cash bail’s history, *see id.* at 37-39.

35. This is for two reasons. First, at this amount, judges are essentially admitting the person is neither dangerous nor a flight risk. If they were, the bail amount would be higher. And second, implementing a program like this will likely be met with community apprehension, so limiting it to people with low bail amounts seems like an appropriately conservative first step.

This assumption is based on the number of people at the Jail with cash bails of \$1,000.00 or less on December 4, 2019.<sup>36</sup> With these in mind, let's begin.

To determine the annual cost of keeping 48 people in custody, you must total three amounts: (1) costs related to inmates; (2) costs related to utilities; and (3) costs related to staff. The first two are simple; the third is not.

#### A. INMATE COSTS

According to Captain Frobig, it costs the Jail roughly \$14.00 per day to provide a person with food, medicine, toiletries, and other basic amenities.<sup>37</sup> Thus, the annual inmate cost for 48 people is \$245,280.00.

$$\begin{array}{r}
 48 \text{ people} \\
 \times \$14.00 \text{ per day} \\
 \times \underline{365 \text{ days per year}} \\
 = \$245,280.00
 \end{array}$$

#### B. UTILITIES COSTS

It costs the Jail about \$36,000.00 per month in utilities.<sup>38</sup> However, according to Captain Frobig, this amount would not drop significantly from a 48-person reduction.<sup>39</sup> That's because most of the utilities are fixed costs, meaning they'd be the same if the Jail was full or empty. Heating is the best example. The Jail is on one heating system, so every cell is heated regardless if it is filled or vacant. Individual cells can't be shut off because doing so would put the Jail out of compliance with safety standards.<sup>40</sup> And while unfixed utility costs would see a reduction, e.g. less water consumption because fewer sinks and toilets in use, Captain Frobig believes the amount would be negligible.<sup>41</sup> For these reasons, the analysis will assume no utilities savings. Thus, the annual utilities cost for 48 people is \$0.00.

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36. That night, there were 64 people in Jail with cash bails of \$1,000.00 or less—18 more than the analysis's 48-person assumption. Interview with Captain Andy Frobig, Administrator, Cass County Jail, in Fargo, N.D. (Nov. 14, 2019); Spreadsheet, 12-4-19 Bondable People – Cass County Jail (Dec. 4, 2019) (on file with author). Thus, to be conservative, the analysis used 48 (the least number of people needed to produce the desired results) instead of 64 (the actual number of people with the qualifying bail amount).

37. Interview with Captain Andy Frobig, Administrator, Cass County Jail, in Fargo, N.D. (Nov. 14, 2019).

38. *Id.*; Spreadsheet, 2018-2019 Cass County Utilities (Dec. 5, 2019) (on file with author).

39. Interview with Captain Andy Frobig, Administrator, Cass County Jail, in Fargo, N.D. (Nov. 14, 2019).

40. Removing heat from individual cells would reduce the Jail's overall exchange rate, which must remain at a certain amount to comply with American Correctional Association standards. *See Core Jail Standards I-CORE-IA-10*, AM. JAIL ASS'N, <http://corrections.wpengine.com/wp-content/uploads/2014/09/Core-Jail-Standards-as-printed-June-2010.pdf> (last visited Apr. 28, 2020).

41. Interview with Captain Andy Frobig, Administrator, Cass County Jail, in Fargo, N.D. (Nov. 14, 2019).

### C. STAFF COSTS

This is where it gets interesting. To determine the annual staff-related cost of keeping 48 people in custody, it all comes down to housing pods. The Jail is set up in housing pods, which are areas for people to live together as a group. Each pod houses 48 people and takes 6 officers to staff.<sup>42</sup> Pods must be staffed 24 hours per day, 365 days per year.<sup>43</sup> With benefits, officers make \$32.00 per hour.<sup>44</sup> The daily cost to staff a pod is thus \$768.00 (\$32.00 per hour x 24 hours). Like utilities, this is a fixed cost, meaning it costs this daily amount regardless of the number of people living in the pod.<sup>45</sup> Thus, the annual cost of staffing a pod is \$280,320.00 (\$32.00 per hour x 24 hours per day x 365 days). The only way to eliminate this cost is to eliminate an entire pod, which requires a 48-person reduction. But recall from above, since the analysis assumes the Jail always has at least 48 people with cash bails of \$1,000.00 or less, this is actually possible.<sup>46</sup> Here's how it would work.

It takes 6 officers to staff a pod. If a pod was eliminated, that would seemingly mean a savings of \$396,000.00 (6 officers x \$66,000.00 annual salary). But it's not that simple. As discussed below, the ultimate goal is to place the 48 people in the Community Supervision Unit ("CSU").<sup>47</sup> To do so, 2 of the officers would have to go work for the CSU. That's because there are currently only 2 CSU officers and they can only supervise a maximum of 25 people each. On December 4, 2019, the CSU had 24 participants.<sup>48</sup> With the addition of 48 people, the program's size would become 72. By adding 2 officers, however, the CSU's capacity would grow to 100. Each officer would thus supervise 18 individuals, less than the 25 per officer limit.

That still leaves a savings of 4 officers, or \$264,000.00 (4 officers x \$66,000.00 annual salary). But again, it's not that simple. First, for many reasons, it's unlikely the officers' positions could simply be terminated.<sup>49</sup> And even if they could be, it wouldn't solve the Jail's biggest staff-related cost overrun—overtime pay. In 2018 alone, the Jail paid almost \$334,000.00

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42. *Id.*

43. *Id.*

44. Spreadsheet, 2020 B22 Salary Projection (Dec. 5, 2019) (on file with author).

45. For example, on December 4, 2019, the least populated housing pod at the Jail had 23 people. Interview with Captain Andy Frobig, Administrator, Cass County Jail, in Fargo, N.D. (Nov. 14, 2019). Despite this, it remained staffed by 6 officers. *Id.*

46. *See supra* Section III – The Cost of Cash Bail; *see also supra* note 36 and accompanying text.

47. *See infra* Section V – The Solution to Cash Bail.

48. For the sake of uniformity, this date is used as the point of reference throughout the analysis. *See supra* Section III – The Cost of Cash Bail; *see also supra* note 36 and accompanying text.

49. Potential reasons include previously negotiated employment contracts or collective bargaining agreements and political, moral, and public relations considerations.

in overtime.<sup>50</sup> However, Captain Frobig believes this number could be cut in half if he could use the 4 officers to cover current staffing needs.<sup>51</sup> This redeployment of manpower is the most accurate staff-related cost savings that would come from a 48-person reduction. Thus, the “true” annual staff cost for 48 people is approximately \$167,000.00 (\$334,000.00 overtime pay x 0.5 redeployment savings).

#### D. TOTAL COST

The annual cost of keeping 48 people in custody in Cass County is \$412,280.00. The equation is as follows:

$$\begin{aligned}
 & \$0.00 \text{ utilities cost} \\
 & + \$167,000.00 \text{ staff cost} \\
 & + \underline{\$245,280.00 \text{ inmate cost}} \\
 & = \$412,280.00
 \end{aligned}$$

### IV. THE CASE FOR CASH BAIL

Those who support cash bail usually do so for two reasons: (1) it ensures the person charged with a crime goes to court; and (2) it keeps the community safe from that person.<sup>52</sup> There are numerous flaws with this logic, however. This section explores those flaws and discusses what an alternative approach might look like.

#### A. CASH BAIL IS AN ALL-OR-NOTHING SYSTEM

The cash bail system only achieves its two goals—court appearance and community safety—if the person *can't* afford their bail amount.<sup>53</sup> That's because when a person is too poor to pay their bail, they are kept in jail, which ensures they can't endanger the community and will appear in court. But what about when the person *can* afford their bail amount? The answer is

50. 2018 YTD Expenditures for Cass County Sheriff (Mar. 29, 2019) (on file with author).

51. According to Captain Frobig: “My current overtime needs are due mostly to staffing vacancies. So if I didn't have to staff a pod, that would save me at least 4 officers. I could then redeploy them to fill these vacancies. Assuming full staffing, overtime would drop probably by well over half, and at that point any future redeployment according to your analysis becomes a much more efficient use of my staff (4 officers can supervise 100 people in the CSU versus more than 4 officers are needed to supervise 48 people in custody).” Interview with Captain Andy Frobig, Administrator, Cass County Jail, in Fargo, N.D. (Nov. 14, 2019).

52. According to Captain Frobig, a third reason cash bail is supported is because it goes towards eventual legislatively-mandated court fines and fees, thereby saving courts the cost of chasing down post-conviction payments. *Id.* While understandable, this is essentially “robbing Peter to pay Paul” because the cost to incarcerate people pretrial is far greater than the fine amounts courts use cash bail to protect. Surely a compromise could be reached where a portion of the savings outlined in this article goes to the court to pay these fine amounts.

53. *Id.*

startling. According to Captain Frobig, when a person posts bail, they are simply released from custody without any form of supervision whatsoever.<sup>54</sup> They're told to show up for court and not commit any crimes while on release, but there's no mechanism in place to actually ensure compliance.<sup>55</sup> It's trust, but don't verify. This all-or-nothing system is the fundamental problem with cash bail. It sets up a scenario where if you're poor you can't be released, but if you're rich you can. Put another way, two people, all other things being equal, are treated differently solely because of their financial circumstances. The person who can pay is given unfettered freedom, while the person who can't is given incarceration and all its negative consequences. Given this, the cash bail system doesn't seem to actually achieve its primary objective—community safety—but instead creates a legal caste system that rewards the rich and punishes the poor.

#### B. THE CSU IS THE MIDDLE GROUND

The CSU, the Jail's case-by-case pretrial release program,<sup>56</sup> solves the problems of the cash bail system because it's a middle ground instead of an all-or-nothing approach. First, it's a fairer way to determine release or detention. Under cash bail, the process is entirely dependent on wealth. If the person can afford their bail, they're released. If they can't, they aren't. By contrast, a person's bail amount is only one of many factors used by the CSU to determine release eligibility.<sup>57</sup> By offering a more holistic approach, the CSU gets away from the legal caste system created by cash bail and makes release determinations based on what should matter most—community safety.

Next, the way the CSU monitors its participants is much different than the cash bail system. Under cash bail, if a person posts bail and is released, there's no monitoring at all. The system's only "teeth" is the threat of bail forfeiture if the person doesn't show up for court. However, research suggests such a threat is rather toothless.<sup>58</sup> In reality, the community has no assurance that anything proactive is being done to make sure the person gets to court and remains law abiding. By contrast, the CSU keeps in regular contact with its participants. From a community safety standpoint, this is an enormous benefit because if an issue arises with one of the participants—a failed drug

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54. *Id.*

55. *Id.*

56. *See supra* Section I – Introduction.

57. *See infra* Section V – The Solution to Cash Bail.

58. In fact, "ever since 1968, when the American Bar Association openly questioned the basic premise that money serves as a motivator for court appearance, no valid study has been conducted to refute that uncertainty. Instead, the best research to date suggests what criminal justice leaders have long suspected: secured money does not matter when it comes to either public safety or court appearance, but it is directly related to pretrial detention." Schnacke, *supra* note 2, at 12.

test, for example—the CSU can intervene before a small problem becomes a big one. Under cash bail, no such safety net exists. And it’s not just about monitoring for the bad; it’s also about helping achieve the good. The CSU provides participants with various resources to help them succeed while they’re back in the community. Cash bail offers no such assistance.

A comparison of the two systems helps illustrate their differences. Let’s say a person named John Q. Citizen is arrested and charged with a crime. Mr. Citizen goes to court for the first time and his bail is set at \$1,000.00.

Cash bail. Mr. Citizen’s ability to be released depends entirely on his pocketbook. If he doesn’t have \$1,000.00, he can’t be released, and he’ll stay in jail until his next court appearance. However, if he does have \$1,000.00, he can be released from jail immediately. If he is, he will simply go back to his normal life until his court date. Nobody will check to make sure he’s remaining law abiding and nobody will provide him with assistance if he needs it. He hopefully won’t skip his court date or commit any new crimes, but if he does, there’s nothing the system can do about it on the front end. Instead, the system is left to deal with him after the fact.

CSU program. Mr. Citizen’s ability to be released is no longer just about his pocketbook. The CSU will evaluate him and decide whether or not to admit him into the program. If not admitted, he’d stay in jail until his next court date or until his circumstances change such that he can be admitted. If admitted, however, he’d be released back into the community, but with the CSU’s supervision and support. They’d help him find housing, employment, and other services as needed. They’d also check to make sure he remained law abiding and attended court. If Mr. Citizen began to be noncompliant, the CSU could pick him up and bring him back to jail until he was ready to try again. Once his case was over, his time with the CSU would end.

## V. THE SOLUTION TO CASH BAIL

For the reasons identified above, the solution in Cass County is simple—place the 48 people with cash bails of \$1,000.00 or less in the CSU.<sup>59</sup>

### A. THE ORIGINS OF THE CSU

The CSU started in April 2017 as a way to reduce the jail population in Cass County. At the time, inmate numbers were rising and Captain Frobig and his staff were under pressure to get them down.<sup>60</sup> To do so, the CSU was

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59. See *supra* Section IV – The Case for Cash Bail.

60. Interview with Captain Andy Frobig, Administrator, Cass County Jail, in Fargo, N.D. (Nov. 14, 2019).

born.<sup>61</sup> The CSU allows otherwise non-releasable people to be released back into the community in certain circumstances.<sup>62</sup> The four-member team is led by Captain Frobig.<sup>63</sup> Below him is Sergeant Chad Violet, who oversees the CSU's day-to-day operations.<sup>64</sup> Under Sergeant Violet are Deputies Ashley Bates and Eric Benson.<sup>65</sup> Together, the two work on the frontlines to actually supervise the individuals who have qualified for the program.

Qualification is straightforward:

- (1) You must be in the custody of the Jail, either pre or posttrial.<sup>66</sup>
  - If pretrial, currently your bail must be \$500.00 or less.
- (2) Your charge or conviction must not be disqualifying.<sup>67</sup>
- (3) Your behavior in custody must warrant consideration for the program.<sup>68</sup>
- (4) Your time in custody must not be negligible.<sup>69</sup>
- (5) You must fill out a form that identifies your needs if released.<sup>70</sup>
- (6) You must have an acceptable place to stay if released.<sup>71</sup>

Applications are reviewed by the entire CSU team and decisions are made on a rolling basis.<sup>72</sup> Once released, the individual is monitored according to a case plan determined by Deputy Bates or Benson, in consultation with Sergeant Violet.<sup>73</sup> Each plan depends on the individual's needs, but all include regular contact between the individual and the supervising officer

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* Notably, when research on this article began, Sergeant Violet was Corporal Violet. He was promoted to sergeant based on his successful implementation of the CSU.

65. *Id.*

66. When the CSU started, it focused primarily on posttrial cases. However, it's now expanded to include pretrial cases as well. *Id.*

67. Interview with Chad Violet, Sergeant, Cass County Sheriff's Office, in Fargo, N.D. (Nov. 14, 2019). According to Sergeant Violet, determining if the offense is disqualifying is done case-by-case. *Id.* However, violent offenses, violations of protection orders, and sex offenses rarely qualify. *Id.*

68. This determination is also done case-by-case. *Id.* Sergeant Violet's one qualification was that the CSU "won't allow an individual who commits an infraction on a Monday to enter the program on a Friday." *Id.*

69. If the Jail knows the individual will likely be in custody only for a short period of time, usually 72 hours or less, Sergeant Violet stated it's not worth the effort it takes to screen for CSU qualification. *Id.*

70. *Id.*

71. According to Captain Frobig, this is the biggest barrier to acceptance: "Lack of acceptable housing is a huge reason many cannot get out. Also housing that is not local; we can't supervise them if they're going to be staying outside our scope of supervision." Interview with Captain Andy Frobig, Administrator, Cass County Jail, in Fargo, N.D. (Nov. 14, 2019). Frobig believes until this is addressed, the type of CSU growth proposed in this article is unrealistic. *Id.* To address this, he recommended part of the prospective savings go toward building affordable housing. *Id.*

72. *Id.*

73. *Id.*

and the use of location monitoring to allow the CSU to know where the individual is at all times.<sup>74</sup> Participation in the program ends one of three ways: (1) the person's case is completed (pretrial); (2) the person's sentence is completed (posttrial); or (3) the person violates a term of release and is brought back into custody.<sup>75</sup>

Program participants are given an opportunity that isn't available anywhere else in North Dakota—to be released back into the community when they would otherwise have to stay in jail.<sup>76</sup> And this was precisely Captain Frobig's and Sergeant Violet's vision when they started the CSU—to identify people who are in jail for reasons other than being dangerous or a flight risk and allow them to be released under reasonable conditions of supervision.<sup>77</sup>

## B. THE SUCCESS OF THE CSU

Since its inception, the CSU has had 347 participants.<sup>78</sup> Of those, 271 completed the program while 76 did not, for a success rate of 78%.<sup>79</sup> Because the unsuccessful participants will undoubtedly be the public's primary concern, Sergeant Violet provided additional context:

- When the “typical” participant is unsuccessful, it's due to “behavior issues or just generally not following the rules” of the program, not because he is committing new crimes after being released back into the community.
- Only 3 individuals have committed “new crimes” after being released back into the community—in each instance, it was shoplifting.
- Only 6 individuals have cut off their location monitoring device and tried to abscond from the CSU after being released back into the community—5 were caught, 1 is still missing.<sup>80</sup>

Under the CSU, the community knows that nearly 8 out of 10 times, the individual released will pose no risk and will succeed. As for the 20% who are unsuccessful, 9 out of 10 times those people don't succeed because of behavior issues, not because they're out in the community committing new crimes.

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74. *Id.*

75. All participants sign a release waiving their right to contest a release violation, which circumvents the need for judges to get involved in instances of noncompliance. *Id.*

76. *Id.*

77. *Id.*

78. Interview with Chad Violet, Sergeant, Cass County Sheriff's Office, in Fargo, N.D. (Nov. 14, 2019).

79. *Id.*

80. *Id.*

Just 9 of 347—some 2.5%—behaved in a way that could fairly be classified as dangerous to the community.<sup>81</sup>

So how do these numbers compare to cash bail? Well, it's hard to say exactly. An apples-to-apples comparison is difficult because the cash bail system doesn't collect any data.<sup>82</sup> That's because people who post bail and are released back into the community don't receive monitoring, let alone the type provided by the CSU.<sup>83</sup> Despite this, comparison is still possible. And the best way to do so is to look at cash bail's two traditional measures of success: (1) whether the person showed up for court; and (2) whether the person remained law abiding.<sup>84</sup>

To figure this out, the same time period as the CSU's dataset was analyzed.<sup>85</sup> During that time, 9,798 people posted cash bail and were released from the Jail.<sup>86</sup> Of these, 100 cases were randomly selected to see if the person showed up for court and remained law abiding.<sup>87</sup> These were the results:

- (1) 61 people were successful, while 39 people were not.
- (2) Of the 39 who were unsuccessful, some failed to appear, some committed new crimes, and some did both.
  - 22 people failed to appear
  - 29 people committed new crimes
- (3) While most crimes were not serious, some were. The most serious included felony domestic violence, felony possession of methamphetamine, and misdemeanor criminal trespass.
- (4) 8 of the 39 unsuccessful people still have active warrants.

Under cash bail, people succeeded 61% of the time.<sup>88</sup> For those who didn't succeed, it was mixed equally between not showing up for court and

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81. *Id.*

82. Interview with Captain Andy Frobig, Administrator, Cass County Jail, in Fargo, N.D. (Nov. 14, 2019).

83. *See supra* Section IV – The Case for Cash Bail.

84. Interview with Captain Andy Frobig, Administrator, Cass County Jail, in Fargo, N.D. (Nov. 14, 2019).

85. The analysis worked this way: First, the 9,798 people were put in a Microsoft Excel spreadsheet. Then they were sorted by last name. Then a number generator was used to randomly select 100 cases. Once selected, each case was analyzed for two things: (1) after posting bail, whether the person failed to appear at any future court appearance before the conclusion of the case; and (2) during the time period between posting bail and the case concluding, whether the person committed any new crimes while back in the community. If the person made all court appearances and committed no crimes, they were considered successful. If they missed a court appearance, committed a new crime, or both, they were considered unsuccessful.

86. Spreadsheet, Cass County Jail – Bail Paid Since 2017 (Feb. 26, 2020) (on file with author).

87. That's because reviewing 100 of the 9,798 people produces a statistically significant sample size such that conclusions regarding the entire group can be drawn with 90% accuracy.

88. Spreadsheet, Random Sample of Cass County Jail – Bail Paid Since 2017 Dataset (Feb. 26, 2020) (on file with author).

committing new crimes.<sup>89</sup> The most common crimes were driving under suspension, violation of no contact orders, and failure to comply with the 24/7 sobriety program.<sup>90</sup> Notably, these instances of noncompliance are the very issues the CSU seeks to prevent by regular contact and the use of location monitoring. Given the CSU's hands-on approach to pretrial supervision, it's fair to assume many of the offenses committed by people released on cash bail would have been avoided had they been in the CSU program instead.

### C. SCALING THE CSU

On December 4, 2019, the CSU had 24 participants.<sup>91</sup> As mentioned above, Deputies Benson and Bates can each supervise a maximum of 25 people.<sup>92</sup> At the time, each had 12 supervisees.<sup>93</sup> If the 48 people with cash bails of \$1,000.00 or less were placed in the CSU, its number would increase to 72. This would increase Deputies Benson's and Bates' caseload to 36 each, 11 higher than allowed. Thus, the only solution would be to increase the CSU's supervisory capacity.

Precisely that becomes possible if a housing pod were closed.<sup>94</sup> A pod closure frees up 6 officers, 2 of whom could transition to the CSU.<sup>95</sup> By doubling the number of supervisors, it doubles the number of people that can be supervised. Now with 4 staff, at 25 people per staff member, the CSU's supervisory capacity would increase from 50 to 100. And since the size of the CSU with the additional 48 people would be 72, that would be 28 less than the maximum allowed.<sup>96</sup> Thus, Deputies Benson, Bates, and the two new officers would each have 18 individuals to supervise, well below the 25 per officer cutoff.

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89. *Id.*

90. *Id.*

91. Interview with Chad Violet, Sergeant, Cass County Sheriff's Office, in Fargo, N.D. (Nov. 14, 2019).

92. *See supra* Section III – The Cost of Cash Bail.

93. Interview with Chad Violet, Sergeant, Cass County Sheriff's Office, in Fargo, N.D. (Nov. 14, 2019).

94. *See id.*

95. An issue identified by both Captain Frobig and Sergeant Violet is that it takes a certain type of officer to work for the CSU, and not all officers are good candidates. Interview with Captain Andy Frobig, Administrator, Cass County Jail, in Fargo, N.D. (Nov. 14, 2019); Interview with Chad Violet, Sergeant, Cass County Sheriff's Office, in Fargo, N.D. (Nov. 14, 2019). Thus, instead of simply requiring two of the officers from the closed pod to transition to the CSU (and risk them not being good fits), Captain Frobig stated he would prefer to post the positions to the entire staff and hire the two best candidates from that pool. Interview with Captain Andy Frobig, Administrator, Cass County Jail, in Fargo, N.D. (Nov. 14, 2019). If the officers from the closed pod did not want to join the CSU, they could take the jobs of the officers that do. *Id.*

96. Interview with Chad Violet, Sergeant, Cass County Sheriff's Office, in Fargo, N.D. (Nov. 14, 2019).

The final notable component of the CSU scaling effort is that it's zero-cost and self-sustaining. It's zero-cost because all staff increases would come from redeploying already hired positions and it's self-sustaining because its growth would be directly tied to housing pod closures. Put another way, the only time the CSU would grow would be when 48 more people could qualify for the program. This could be done by continuing to increase the qualifying bail amount.<sup>97</sup> Regardless how its achieved, once there are 48 new people, the exact same officer redeployment process outlined in this article is available—2 officers move to the CSU, the CSU's supervisory capacity is expanded by 50, and 4 officers are redeployed as needed by Captain Frobig. Eventually, all redeployment needs would be filled, at which point more officers could be moved to the CSU to lighten the supervisory load on staff.

## VI. SUMMARY OF FINDINGS

- (1) Closing a housing pod at the Jail and placing the 48 people in the CSU would save Cass County over \$400,000.00 per year.
  - Pod 1 and 2 closure = \$412,280.00 annually
- (2) Closing two pods would eliminate the need for overtime pay.<sup>98</sup> All subsequent officer redeployments could thus be used elsewhere. For example, the Jail could fill its current open positions with redeployed officers, which would save \$264,000.00 per year (4 officers x \$66,000.00 annual salary).<sup>99</sup>

$$\begin{aligned}
 & \$412,280.00 \text{ pod closure savings} \\
 & + \underline{\$264,000.00 \text{ filling open positions savings}} \\
 & = \$676,280.00 \text{ total annual savings for Pod 3 closure}
 \end{aligned}$$
- (3) Cass County could repurpose the empty pods in a way that benefitted inmates and staff. Requests for proposals could be made and the County Commission could select the best projects.
- (4) The CSU seems to be better than the cash bail system for two reasons. First, it provides the community with more safety than cash bail. The CSU keeps in regular contact with its participants who are released back into the community, whereas the cash bail system does not. The CSU's success rate is also 17% greater

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97. Right now it is \$500.00. This article shows what would happen if it was increased to \$1,000.00. And there's likely more growth opportunity if the amount was increased further.

98. Every pod closure frees up 4 officers who can be redeployed to cover overtime shifts. According to Captain Frobig, this would reduce overtime by 50%. Interview with Captain Andy Frobig, Administrator, Cass County Jail, in Fargo, N.D. (Nov. 14, 2019). Thus, with a second pod closure, another 4 officers could be redeployed to eliminate the remaining 50%. At that point, the Jail's overtime costs would be eliminated. *See supra* Section III – The Cost of Cash Bail.

99. According to Captain Frobig, the Jail has 4 open officer positions at all times. Interview with Captain Andy Frobig, Administrator, Cass County Jail, in Fargo, N.D. (Nov. 14, 2019).

than cash bail—78% to 61%. Finally, when people were unsuccessful under cash bail, their infractions were far more serious than those unsuccessful under the CSU. Second, the CSU is much cheaper than cash bail. By expanding the CSU and reducing reliance on cash bail as described above, Cass County would save more than \$400,000.00 per year.<sup>100</sup>

- (5) Releasing people to the CSU instead of keeping them in jail significantly minimizes the disruption to their lives that comes with being charged with a crime. While this wasn't the focus of this article, it will be for a future one.

## VII. CONCLUSION

Criminal justice reform is having a moment. For the first time in nearly 30 years, we as a society are thinking critically about how and why we punish people and whether what we're doing is working. And time and again, one of the areas identified as needing reform the most is cash bail. Other than the bail bond industry (for obvious reasons), most everyone agrees that the cash bail system is broken. Yet somehow it remains in place in the vast majority of jurisdictions in the United States. How is that possible? Simply put, fear of the alternative. Sure cash bail has its flaws, but if not it, then what?

In North Dakota, this article answers that question loudly and clearly—the Community Supervision Unit. And it's not even close. The CSU is safer for the community, it is cheaper for the taxpayer, and it is more humane for the individual charged with a crime. On top of all that, it's not some pie in the sky idea that sounds good on paper but not in practice—it really works. The 67th North Dakota Legislative Assembly begins January 5th, 2021. If criminal justice reform is seriously on the agenda of either political party, this article provides a clear, evidence-based alternative to cash bail. The Cass County Jail unwittingly created the blueprint for true bail reform in North Dakota. The state's elected officials should take notice and act.

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100. This conclusion echoes national research: "In short, the use of money at bail at the expense of risk-based best practices tends to create two main reasons cited for the need for pretrial reform: (1) it needlessly and unfairly keeps lower risk defendants in jail, disproportionately affecting poor and minority defendants at a high cost to taxpayers; and (2) it too often allows higher risk defendants out of jail at the expense of public safety and integrity of the justice system." Schnacke, *supra* note 2, at 16.