REFORMING BAIL AND PRETRIAL DETENTION

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Issue Brief: Reforming Bail and Pretrial Detention

By Josh Withrow

The practice of cash bail — of setting a price at which a defendant accused of a crime might guarantee his or her freedom before trial — traces back to the formative days of the English common law tradition upon which America's was based. In modern times, however, cash bail amounts, and the resulting pre-trial detention of those who cannot afford to pay, seem to have become unmoored from their basic purpose: providing insurance that the accused will show up for the trial that will determine their guilt or innocence.

Some advocates would go so far as to suggest that cash bail itself should be abolished, with several states and localities having taken this step already. Yet, eliminating cash bail, and pre-trial detention, altogether ignores a secondary function of the practice, which is to allow judges to make pre-trial release prohibitive for those accused whose past record or the heinous nature of their alleged offense renders them a likely menace to public safety.

But the data make clear that excessive cash bail amounts and pre-trial detention are greatly overused, at the cost of great harm to the innocent awaiting trial, of filling jails with offenders who have yet to be convicted of a crime, and sometimes of consigning even minor offenders to punishment in excess of what they would eventually receive if found guilty. The processes by which bail amounts are set at the state and federal levels cannot presently be considered either effective or just.

The Rise of Excessive Bail and Pre-trial Detention

The revocation of an individual's freedom is of a matter of utmost severity in a society conceived from the principles of liberty. It was no accident that fully half of the protections against government that were enshrined by our founders in the Bill of Rights relate to due process, including the Eight Amendment's specific warning that "Excessive bail shall not be required."

Both cash bail and pre-trial detention emerged as a compromise to resolve the tension between the Common Law presumption of innocence until proven guilty, and that of ensuring that the accused does show up to face their trial and judgment. In most states, outright denial of an opportunity for pre-trial release is limited to the most serious offenses, and thus judges have used the imposition of very high bail amounts as a way of containing other accused offenders who are considered more dangerous or more likely to abscond.

Rather than paying the full bail amount up front, the most common means of securing bail has become to secure a bond, most frequently through private bail bondsmen who frequently take a 10 to 15 percent, up-front, non-refundable payment on the full bail amount from the

1 John-Michael Siebler and Jason Snead, "The History of Cash Bail," The Heritage Foundation, Aug. 25, 2017. https://www.heritage.org/courts/report/the-history-cash-bail

2 "Pretrial Detention," National Conference of State Legislatures, June 7, 2013. https://www.ncsl.org/research/civil-and-criminal-justice/pretrial-detention.aspx

accused along with an agreement on collateral equal to the rest of the bail amount. The promise to the court is that the bond company will take action to secure the rest should the accused fail to show up.

Though the use of surety bonds to guarantee trial attendance has a long history, until quite recent times it was far more common that accused offenders be released upon their own recognizance, with no up-front cash payment required. The shift towards cash bail was not an accident; rather it was a deliberate part of the shift in mindset during the unsettled 1970s and 1980s that pre-trial detention should be weighted more heavily towards a preemptive judgment of the danger posed by the offender than merely whether they posed a flight risk. This period saw an increase in restrictions upon judges in setting bail, such as bail schedules that set minimum amounts based on the alleged crime. As recently as 1990, it was nearly twice as common to be released on recognizance as on bond, whereas by 2004 that ratio had nearly reversed.

It is certainly a legitimate concern that suspects who would pose a real danger to public safety not be released where they can continue to do harm. As is all-too-often the case, however, vast numbers of low-risk defendants have been caught up in a system of pre-trial detention that was intended to address only the most dangerous minority of them.

According to the Vera Institute for Justice, "the number of people who are detained while awaiting trial—the 'pretrial population'— has increased more than fivefold: from 82,922 people in 1970 to 441,790 in 2015. While the pretrial population comprised about half of people in jail prior to the early 1990s, it now accounts for approximately two-thirds of people in jail nationwide." Prison Policy Institute analyses of jail statistics show that "[t]he convicted population has actually decreased over the past 20 years," while "[i]n most states over the last three decades, the number of people in jails has outpaced population growth by 2, 3 or even 4 times." As a result, by 2009 a Bureau of Justice study showed that 34 percent of felony defendants detained in local jails pre-trial were there merely for inability to afford bond.

Unintended Consequences

There has been steadily increasing evidence compiled over the past several decades showing how pre-trial detention can have lasting negative effects on the accused, whether or not they are eventually found guilty. To begin with, setting bail above a defendant's ability to pay plays heavily into the favor of prosecutors, as the accused may feel compelled to plead guilty simply to avoid either the pre-trial detention or to spare their families from feeling obligated

3 John S. Goldkamp, " Danger and Detention: A Second Generation of Bail Reform," *Journal of Criminal Law and Criminology*, 76:1, 1985. https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=6469&context=jclc

4 Jason Snead, "A Path Forward for Pretrial Justice Reform," Heritage Foundation Legal Memorandum, No. 245, May 17, 2019. https://www.heritage.org/crime-and-justice/report/path-forward-pretrial-justice-reform

5 Léon Digard and Elizabeth Swavola, "Justice Denied: The Harmful and Lasting Effects of Pretrial Detention," Vera Institute for Justice, April 2019. https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf

6 Joshua Aiken, "Era of Mass Expansion: Why State Officials Should Fight Jail Growth," Prison Policy Initiative, May 31, 2017. https://www.prisonpolicy.org/reports/jailsovertime.html

7 Bernadette Rabuy and Daniel Kopf, "Detaining the Poor," Prison Policy Initiative, May 2016. https://www.prisonpolicy.org/reports/DetainingThePoor.pdf

to scrape together bail on their behalf. A 2017 Stanford study in Harris County, Texas showed that even misdemeanor defendants were 25 percent more likely to plead guilty, and their average bail amounts were about $2,800.

It seems obvious, but bears repeating, that the overuse of high bail amounts is disproportionally devastating to lower-income accused, and they predictably represent a tremendous percentage of those who are detained pre-trial simply for inability to pay. A 2016 study showed that fully half of felony defendants were unable to pay afford a $5,000 bail (presumably requiring on average a $500 bond to secure release). This is in line with data showing that the median pre-arrest income of defendants held on bail is less than half that of their fellow citizens. This effective class distinction between those who are held pre-trial and those who are not is in obvious contradiction to basic notions of justice.

Adding insult to injury, for those unwilling or unable to meet bail, pre-trial detention has repeatedly been found to lead to a higher rate of being found guilty, longer sentences, and increased recidivism among those convicted. Various explanations likely factor into these alarming statistics, including a decreased ability of the accused to assemble a quality defense while incarcerated, the criminal associations and behaviors learned in jails, or untreated addiction or mental health issues. Another is that in many states those who are unable to afford their own counsel are not provided one for bail hearings.

For those who either end up not being convicted at all or not earning further incarceration, the pretrial detention period is particularly unjust, because the disruptions caused by even a short stint in the local jail can cause major, lasting social and economic harms to the defendent. Even brief incarceration may result in the loss of a job or housing, and strains upon the defendant's family and social ties.

Of course, this increase in pre-trial incarceration has a cost in dollars too — estimated by the Prison Policy Initiative at over $13.6 billion per year. This is just the direct cost of housing these not-yet-convicted offenders, in addition to the indirect social and financial burdens imposed by all of the other collateral consequences discussed above.

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8 Paul S. Heaton, Sandra G. Mayson, and Megan T. Stevenson, "The Downstream Consequences of Misdemeanor Pretrial Detention," Stanford Law Review, Vol. 69, 2017. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2809840

9 Will Dobbie, Jacob Goldin, and Crystal Yang, "The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges," National Bureau of Economic Research, Aug., 2016. https://scholar.princeton.edu/sites/default/files/wdobbie/files/bail.pdf

10 Patrick Liu, Ryan Nunn, and Jay Shambaugh, "The Economics of Bail and Pretrial Detention," The Hamilton Project, Dec., 2018. https://www.hamiltonproject.org/assets/files/BailFineReform_EA_121818_6PM.pdf

11 See, for examples: Dobbie, Goldin, and Yang, op. cit.; Christopher Lowenkamp, Marie VanOstrand, and Alexander Holsinger, *The Hidden Costs of Pretrial Detention,* Laura and John Arnold Foundation, Nov., 2013. https://www.ncsc.org/__data/assets/pdf_file/0019/1585/ljaf_report_hidden-costs_fnl.ashx.pdf; Arpit Gupta, Christopher Hansman, and Ethan Frenchman, "The Heavy Costs of High Bail: Evidence from Judge Randomization," *Journal of Legal Studies,* 45:2, June, 2016, http://www.columbia.edu/~cjh2182/GuptaHansmanFrenchman.pdf

12 Liu, Nunn, and Shambaugh, *op.cit.*

13 Alexander M. Holzinger, "Analyzing Bond Supervision Survey Data: The Effects of Pretrial Detention on Self-Reported Outcomes," Crime and Justice Institute, June, 2016. https://web.archive.org/web/20161020154549/http://www.crj.org/page/-/publications/bond_supervision_report_R3.pdf

7 Peter Wagner and Bernadette Rabuy, "Following the Money of Mass Incarceration," Prison Policy Initiative, Jan. 25, 2017. https://www.prisonpolicy.org/reports/money.html

Reform: What Doesn't Work

Given all of these deeply troubling problems caused or exacerbated by excessive cash bail, it is no surprise that momentum has grown for simply ending monetary requirements for bail altogether. However, taking the monetary bail option away from the menu of options available to judges may not be the panacea that reformers envision.

Take, for example, Maryland, which limited the use of cash bail, only to see an increase in the number of prisoners denied release options altogether. "Perhaps we didn't consider the possibility that judges would routinely err on the side of incarceration." writes the R Street Institute's Stephen Greenhut in Reason, "It makes sense. What judge (especially an elected one) wants to be the one that mistakenly released a violent criminal?"

In addition to attempting to eliminate cash bail altogether, some states have eliminated private bail bondsmen. The many detractors of private bail bonds correctly point out the rent-seeking incentive the bondsmen have to lobby against reforms to cash bail. As the Texas Public Policy Foundation's Marc Levin notes, however, commercial bail bondsmen can serve an important role in letting private markets take the costs of ensuring trial attendance (and securing those who abscond) off the ledger of a state's criminal justice system. They can also be a buffer to help ensure that the full profit from forfeited bail amounts do not redound to the employers of the same people assigning the bail.

It is important to note that in spite of the presumption of innocence, the constitutionality of both cash bail and of refusing to offer bail for severe crimes has been upheld multiple times by the U.S. Supreme Court. Chief Justice Fred Vinson noted that "Like the ancient practice of securing oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused." Excessive bail may be unconstitutional, but what classifies as "excessive" is very much left for lawmakers and judges to figure out.

Promising State-Level Reforms

Just because cash bail is effective doesn't mean it shouldn't be constrained, or that it is the only effective means of achieving the same end. Indeed, alternative pre-trial release conditions are in effect in many states and can be used in conjunction with or instead of cash bail in many instances.

- **Eliminate cash bail amounts that are not tied to public safety or flight risk:** Rigid bail schedules and mandatory minimum bails set per crime are well outside the primary purpose of ensuring that the accused show up in court. Whatever guidelines and restraints

14 Steven Greenhut, "California's Bail Reform Is Worse Than Nothing," *Reason,* Aug. 29, 2018. https://reason.com/2018/08/29/californias-bail-reform-deal-is-worse-th/
15 Marc Levin, "Pretrial Justice 101: Key Points for Policymakers," Texas Public Policy Foundation, Feb. 2015. https://files.texaspolicy.com/uploads/2018/08/16100636/PreTrialJustice-CEJ.pdf
16 Siebler and Snead, *op. cit.*
17 Stack v. Boyle, 342 U.S. 1 (1951) https://supreme.justia.com/cases/federal/us/342/1/

may be placed upon judges in setting bail, a formulaic index of bail amounts by offense will always end up entrapping offenders who might otherwise be judged perfectly safe to release on recognizance or under supervision.

- **Use risk assessment as a component of (not a replacement for) bail judgments:** As with sentencing and supervision reform, one possibility in reforming bail amounts is to reevaluate risk assessment. As a cautionary note, however, data-driven risk assessment has limitations, not the least of which is that the inputs in a risk assessment formula can't be assumed to be bias-free. And in general, there is no substitute for human judgment and contextual information about an accused offender's danger to society or likelihood to flee. Nevertheless, states which have seen some of the most successful bail reform efforts (in terms of both reduced pre-trial detention and lower crime rates), like New Jersey and Kentucky, have successfully incorporated some level of impartial risk assessment into their process of scheduling bail.

- **Presume release for minor offenses:** One component of better risk assessment could certainly be establishing a broader number of minor, especially non-violent, crimes for which pre-trial release is presumptively granted. Simply placing the burden on the state to make a case for why a person poses enough of a risk to demand a large cash bail should be enough to reduce the number of unreasonable bail amounts handed out, while allowing judges a necessary degree of discretion.

- **Increase availability of non-cash bail options:** Successful reforms also look beyond cash bail at the many other ways that pre-trial release and public safety can be balanced. For example, pre-trial supervision can be an effective substitute, though as we explore in our brief on probation and parole supervision, the structure and incentives of a supervision program are key to whether they succeed. The increased ubiquity of technology can ease the burden of pre-trial supervision for both the justice system and on the accused.

Pre-trial diversionary programs can also offer a way to allow release without bond that may also serve to help direct the accused to ways they can deal with contributing factors to their arrest, such as addiction or mental health issues. A number of states (including, once again, New Jersey) have begun to expand such programs, which if well administered can reap the social and fiscal benefits of helping people out of dangerous or antisocial behaviors and therefore preventing future crimes.

Balancing the interests of public safety with the bedrock principle of innocence until proven guilty is never more difficult in practice than in the period after an arrest. No simple fix, such as merely eliminating all cash bail, can strike that balance perfectly, nor are either judges or algorithms perfect in evaluating risk. However, states and localities should always aim to ensure that cash bail, to the extent that is used, does not function as a cost barrier to mere participation in a fair and just legal system.[1]

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18 This concern has caused some bail reform advocates, principally on the political left, to shun risk assessment analyses altogether.

19 Snead, *op. cit.*

20 Josh Withrow, "Issue Brief: Reforming Probation and Parole Supervision," FreedomWorks, Oct. 29, 2020. https://www.freedomworks.org/content/issue-brief-reforming-probation-and-parole-supervision