

PRETRIAL SERVICES: AN EFFECTIVE ALTERNATIVE TO MONETARY BAIL



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Research Report

California's Public Safety Realignment Act, which shifted the responsibility of adults convicted of low-level offenses from the state to the counties, was intended to encourage counties to employ innovative and effective alternatives to incarceration.¹ Many California counties, however, have continued to rely heavily on incarceration, pushing their jails to capacity. In an attempt to reduce jail overcrowding, attention is turning to the 63 percent of people held in county jails who have not been convicted of a crime. Many of these people are waiting for their day in court in jail — not because they pose a risk to public safety, but simply because they cannot afford to post bail.

Most people held in California's jails have not had their day in court.



Average California jail population. Source: BSCC, 2013.

The jails of 17 counties in California, including Fresno, have Federal population caps due to overcrowding (LHC, 2013). These counties must not exceed maximum capacity, even if they must release people before they have completed their sentences to comply. The Fresno County Sheriff told the Little Hoover Commission she releases 40-60 people early every day due to lack of capacity (LHC, 2013). In 2013, between the 45 counties reporting to the Board of State and Community Corrections, an average of 10,300 people were released early from jail every month due to lack of capacity — more than half had been sentenced, while the remainder were pretrial (BSCC, 2013).

This high pretrial population is due, in large part, to California's over-reliance on a monetary bail system. Under such a system, people who have been arrested for certain crimes must await trial in jail, unless they deposit a set amount of money ("bail"), which is then returned to them when they appear in court. This cash-dependent system allows those who are wealthy to purchase their release from jail while those without the means remain incarcerated.

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¹ Under Realignment (Assembly Bill 109), which went into effect on October 1, 2011, counties must manage people convicted of non-violent, non-serious, non-sexual felonies at the local level, rather than sentencing them to state prison. Although Realignment encourages counties to employ alternatives to incarceration, many have experienced jail overcrowding, resulting in significant discussion regarding the appropriate use of jail bed space.

This publication examines the challenges of relying on a monetary bail system and highlights existing solutions, such as pretrial services, that save money, reduce racial disparities, alleviate jail bed space, and promote public safety.

Background on the Monetary Bail System

Although “bail” is often associated with money, the term refers generally to the process of releasing people from custody, while reasonably ensuring they appear for their trial and do not commit any crimes. In addition to cash bonds, the various forms of release include own recognizance (OR), unsecured bond, conditional release, and release to pretrial services (see “Bail Release Definitions”).

Nationally, the use of monetary bail has increased dramatically in recent years, while other forms of release have become less common. In 1990, 25 percent of people charged with felonies were given monetary bonds, while 42 percent were released on their own recognizance (OR). In 2006, however, these percentages are inverted: Bonds accounted for 43 percent of felony cases, while only 25 percent were released on OR (Pepin, 2013).

The commercial bail industry, which will post a defendant’s bond in exchange for a non-refundable 10 percent fee, profits from the use of money bonds. The industry also invests heavily in lobbying on the state and federal levels, and may have had a significant influence on these trends (Gullings, 2012).

Use of Monetary Bail Creates Income and Racial Disparities

Under a monetary bail system, release is not based on the likelihood to appear in court or commit another crime, but access to funds. The frequent use of monetary bail in recent years has exacerbated the systemic economic and racial disparities in the criminal justice system.

The population most impacted by the justice system — low-income communities of color — has limited means to secure release by purchasing a commercial bail bond for the non-refundable 10 percent fee, let alone covering the entire set bail. In fact, in New York City, 11,000 of the people charged with misdemeanor offenses within a one-year period were incarcerated while awaiting trial because they could

Bail Release Definitions

Own Recognizance (OR):

Defendant assumes responsibility to appear in court.

Unsecured bond: Defendant is released but if he or she fails to appear in court they are liable for the entire bond amount

Cash bond: Defendant posts entire bail amount, **deposit bond** (percentage of the bail), **property bond** (using property as collateral), or a **commercial/surety bond** (defendants pay a 10 percent nonrefundable fee to a bail agency, which posts bail). In most cases, if the defendant appears for court, the entire payment is returned, with the exception of a nonrefundable fee of a surety bond.

Conditional or Pretrial Release:

Defendant is released after being assessed and agreeing to certain conditions, including drug tests, court reminders, check-ins, and GPS monitoring.

not raise bail of \$100 or less (PJI, 2012). Even in cases where defendants are able to post bail, they may need to deplete funds for necessities like rent, groceries, transportation to work, or child support.

Numerous studies have also shown racial disparities that are independent of economic status. For example:

- The average bail amount in California for Latino defendants in a 2005 analysis was \$53,031, compared to \$28,340 for White defendants (CSJ, 2014).
- African Americans are less likely to be released on OR, are more likely to be detained pretrial, and receive significantly higher bail than White defendants (Wooldredge, 2012, cited in JPI, 2012, Kutateladze & Andriloro, 2014).
- A national study of felony cases from 40 of the largest 75 counties found that 27 percent of White defendants were held in jail pretrial because of their inability to post bail, compared to 36 percent of African American defendants and 44 percent of Latino defendants (PJI, 2012).
- The Bureau of Justice Statistics showed that in 75 of the largest counties only 55 percent of Latino defendants were released pretrial, compared to 68 percent of White individuals (Cohen & Reaves, 2007).

Pretrial Detention Results in Adverse Outcomes

Studies suggest that those who are detained while awaiting trial have worse outcomes than those released pretrial. They are more likely to be convicted and receive harsher penalties, even when all other factors are equal (ACCD, 2011). For example, a 2013 study by Laura and John Arnold Foundation found that those detained pretrial are:

- 4 times more likely to be sentenced to jail
- 3 times more likely to receive longer jail sentences
- 3 times more likely to be sentenced to prison
- 2 times more likely to receive longer prison sentences
- 40 percent more likely to recidivate if held for two to three days, and 74 percent more likely if held for 31 days or more, compared to those held 24 hours (LJAF, 2013)

The Bureau of Justice Statistics found 60 percent of defendants who are released pretrial are convicted, compared to 78 percent of those who are detained (Cohen & Reaves, 2007). Although the reasons for this difference are unknown, possible factors include the defendants having a difficult time meeting with lawyers, being away from family or other support systems, and having to appear in court in jail-issued uniforms — at times shackled.

Collateral Consequences

Anthony Dorton was accused of assaulting and pimping a woman in San Francisco. His bail was set at \$300,000, which he could not afford. He sat in jail for 10 months while awaiting trial, and was eventually acquitted. During his 10-month detention, he was evicted, his car was repossessed (incurring him a \$2,000 impound fee), and his credit was damaged due to late credit card and car payments. His 10 months in jail had cost the

Pretrial detention may also cause people to lose their jobs, homes, default on car payments, fall behind on child support, and lose custody of dependent children or community ties (See “Collateral Consequences”). By losing a job, a home, or being denied other pro-social activities that promote civic engagement, the person is more likely to recidivate and become further involved with the justice system.

A Cash-Dependent System Does Not Promote Public Safety

Monetary values are not linked to public safety. There is no cash value that can ensure an individual will appear in court or deter him or her from committing a crime (Neal, 2012). Although people who are charged with more serious crimes receive higher bail amounts, those with significant means can pay for their release. In the case of the commercial bail industry, bail bondsmen do not administer validated risk assessments to determine their clients’ risk of re-offending— rather, they evaluate only the clients’ ability to pay. Research shows most people will return to court without having to pay a bondsman’s non-refundable fee (Bradford, 2012). Even with bail increasing dramatically, failure to appear rates have not altered substantially (Neal, 2012).

Since bondsmen run profit-driven businesses and receive higher fees for higher bail amounts, cases with larger bonds are more attractive, even though these bonds are generally placed on individuals charged with more serious crimes. Bondsmen have no incentive to ensure the safety of the public; if their clients are rearrested for new offenses, they may even receive more money for posting an additional bail. Commercial bond companies are liable for the bond if their client does not appear in court, but they often default on their payments to the courts with little consequence. In 2010, bail bond agencies owed counties in California \$150 million in 2010 (Sullivan, 2010).

Pretrial Services are Effective Alternatives to Monetary Bail

The ineffective commercial bail industry operates in a justice system that already has alternatives, which can reduce the injustices described above. A variety of pretrial services are more beneficial to the community, to the economy, and to those who have been charged with crimes.

Pretrial services also provide targeted intervention, programs, and supervision that fit a defendant’s needs, including drug rehabilitation and varying forms of supervision like GPS monitoring, court call reminders, drug tests, and check-ins. Risk assessments can determine whether pretrial services are appropriate. These tools evaluate diverse factors — including residency status, employment, and mental health or substance abuse issues — that can help predict a person’s flight risk and potential danger to the community (Bradford, 2012).

Many counties across the nation are already using pretrial services, with great success. For example, Montgomery County, MD, increased the use of pretrial services from 20 percent to 52 percent of defendants, without any change in rates of re-arrests or court appearances (PJI, 2012). Also in Washington DC, where commercial bail bonds are no longer practiced, pretrial services have resulted in an 88% appearance rate (Chung, 2012, p. 25).

County	Appearance Rate	Re-arrest Rate
Santa Cruz	89%	8%
Santa Clara	88%	2%
Yolo	92%	5%
Marin	91%	9%
San Francisco	97%	-
Commercial Bail Bond (National Average)	82%	16%

In California, five counties have evaluated the success of their pretrial services (see Table). All experienced higher court appearance rates and lower re-arrest rates than the national average for commercial bail bond agencies. (LHC, 2013; Neal, 2012; Aungst, 2012; Dooley-Sammuli, 2013; Cohen and Reaves, 2007).

Not only have pretrial services maintained court appearance and re-arrest rates comparable to those of commercial bail bonds, they are also more efficient uses of money. Detaining people pretrial incurs extensive monetary costs. In California, the

average cost of incarcerating a person in county jail is \$100 per day, while pretrial services cost a mere \$2.50 per day (Neal, 2012).

Conclusion

In the post-Realignment era, counties are taking on more responsibility for people involved with the justice system. Although Realignment encourages counties to develop and implement alternatives to incarceration for people convicted of low-level offenses, many counties continue to rely on incarceration, resulting in widespread jail overcrowding.

A key area of unnecessary incarceration is the pretrial population: People held in jail due to their financial status rather than their risk to public safety. By increasing the use of pretrial services and decreasing the use of monetary bail, counties could reduce income and racial disparities, save money, lower incarceration rates, give defendants the targeted help they need, and protect public safety.

References

- American Council of Chief Defenders (ACCD). (2011). *Policy Statement on Fair and Effective Pretrial Justice Practices*. http://www.nlada.org/Defender/Defender_ACCD/ACCDpretrialrelease.
- Aungst, S. (2012). Pretrial Detention & Community Supervision Best Practices and Resources for California Counties. *CA Fwd: Partnership for Community Excellence*. Retrieved from http://caforward.3cdn.net/7a60c47c7329a4abd7_2am6iyh9s.pdf
- Bradford, S. (2012). For Better or For Profit: How the Bail Bonding Industry Stands in the Way of Fair and Effective Pretrial Justice. *Justice Policy Institute*. Retrieved from <http://www.justicepolicy.org/research/4388>
- BSCC, (2013). *Profile*. [online] Measuring Realignment at the Two-Year Mark: Jail Population Trends. Available at: <http://public.tableausoftware.com/profile/kstevens#!/vizhome/ACJROctober2013/ACJROctober2013> [Accessed 9 Jul. 2014]
- Californians for Safety and Justice (CSJ). (2014). *Latino Voices: The Impacts of Crime and Criminal Justice Policies on Latinos* (p. 12). Californians for Safety and Justice. Retrieved from http://libcloud.s3.amazonaws.com/211/04/1/430/LatinoReport_7.8.14v1.pdf
- Chung, J. (2012). Bailing on Baltimore: Voices from the Front Lines of the Justice System. *Justice Policy Institute*. Retrieved from <http://www.justicepolicy.org/research/4412>
- Cohen, T., & Reaves, B. (2007). *State Court Processing Statistics, 1990-2004: Pretrial Release of Felony Defendants in State Courts* (pp. 6-9). US Department of Justice. Retrieved from <http://www.bjs.gov/content/pub/pdf/prfdsc.pdf>
- Dooley - Sammuli, M. (2013). *Little Hoover Commission: Testimony on Bail & Pretrial Services*. American Civil Liberties Union of California (ACLU)
- Gullings, A. (2013). *The Commercial Bail Industry: Profit or Public Safety?* San Francisco: Center on Juvenile and Criminal Justice. Retrieved from http://www.cjcj.org/uploads/cjcj/documents/Profit_or_Public_Safety.pdf
- Hopper, A., Dooley-Sammuli, M., & Evans, K. (2012). *Public Safety Realignment: California at a Crossroads*. American Civil Liberties Union (ACLU).
- Kutateladze, B., & Andiloro, N. (2014). *Prosecution and Racial Justice in New York County – Technical Report*. Vera Institute of Justice. Retrieved from <https://www.ncjrs.gov/pdffiles1/nij/grants/247227.pdf>
- Laura and John Arnold Foundation (LJAF), (2013). *Pretrial Criminal Justice Research*. Retrieved from http://arnoldfoundation.org/sites/default/files/pdf/LJAF-Pretrial-CJ-Research-brief_FNL.pdf
- Little Hoover Commission (LHC). (2013). *Letter to Governor Brown and the Legislature on Bail and Pretrial Services*. Sacramento. Retrieved from <http://www.lhc.ca.gov/studies/216/Report216.pdf>
- Neal, M. (2012). Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail. *Justice Policy Institute*. Retrieved from <http://www.justicepolicy.org/research/4364>

Pepin, A., & others. (2013). 2012-2013 Policy Paper Evidence-Based Pretrial Release. *Conference Of State Court Administrators (COSCA)*. Retrieved from http://www.colorado.gov/ccjdir/Resources/Resources/Ref/EBPre-TrialRelease_2012.pdf

Pretrial Justice Institute (PJI). (2012). *Rational and Transparent Bail Decision Making: Moving From a Cash-Based to a Risk-Based Process*. MacArthur Foundation. Retrieved from <http://www.pretrial.org/wpfb-file/rational-and-transparent-bail-decision-making-pdf/>

Samaha, A. (2012). Barred from Freedom: How Pretrial Detention Ruins Lives. *SF Weekly*. Retrieved from <http://www.sfweekly.com/2012-11-21/news/barred-from-freedom-how-the-pretrial-detention-system-ruins-lives/>

Sullivan, L. (2010). Bail Burden Keeps U.S. Jails Stuffed With Inmates. *NPR.org*. Retrieved 3 June 2014, from <http://www.npr.org/2010/01/21/122725771/Bail-Burden-Keeps-U-S-Jails-Stuffed-With-Inmates>

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