

Beyond Cash Bail: Public Health, Risk Assessment, and California Senate Bill 10

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Executive Summary: The detrimental effects of incarceration on physical and mental health are widely acknowledged. However, 76% of the United States jail population is awaiting trial without having been convicted of a crime (Sawyer and Wagner 2020). This is driven by the monetary bail system, which the state of California moved to abolish by passing the 2018 California Money Bail Reform Act (*Senate Bill 10, hereafter SB 10*). SB 10 proposes the use of algorithmically driven risk assessment tools to determine pretrial release. However, actuarial risk assessments are not calibrated to California's diverse demography and are insufficient to determine which defendants pose flight or public safety risks. SB 10 is predicted to perpetuate similar socioeconomic and racial disparities as the current system, while failing to decrease pretrial detention. We recommend opposing SB 10 in favor of pretrial release for most misdemeanor and nonviolent defendants. The funding currently allocated for pretrial detainment should be redirected toward evidence-based and restorative pretrial supervision practices through the enactment of new bail-reform legislation by the state of California. Increasing the use of diversion programs, which redirect defendants to the appropriate mental health or substance abuse programs, also presents opportunities to restore treatment to the jurisdiction of public health rather than criminal justice. Transitioning from a reliance on pretrial detention to pretrial services will mitigate the collateral effects of incarceration while improving public health, public safety, and substantially reducing the cost of incarceration.

I. Statement of issue

While criminal law in the United States is based on a presumption of innocence and reserves pretrial detention for unmanageable flight or public safety risks (Jones 2013), the pretrial incarceration rate constitutes over 95% of the growth in jail population over the last twenty years (Sawyer and Wagner 2020). This is a direct consequence of the monetary bail system, which incarcerates those awaiting trial if unable to meet a financial requirement. This is especially prevalent in

California, which has higher bail costs (five times the country's median in 2009 (State Court Processing Statistics 2009)) and higher rates of pretrial detention in its urban counties compared to that of other states (Tafoya 2015; Board of State and Community Corrections 2019).

Cash Bail can facilitate the release of high-risk/violent defendants (Laura and John Arnold Foundation 2013) and is socioeconomically and racially discriminatory (Gelbach and Bushway

2011; Demuth and Steffensmeier 2004; Jones 2013). People unable to afford bail fall in the poorest third of society and many of those incarcerated fall below the poverty line (Rabuy and Kopf 2016). In California, bail amounts are higher for Black men by 35% and Hispanic men by 19% compared to white men accused of similar crimes (Gelbach and Bushway 2011). Low-income defendants are also disproportionately exposed to profitable exploitation by the commercial bail industry (Appleman 2016; Holland-Stergar et al. 2017; Rabuy and Kopf 2016) (i.e., nonrefundable premiums, interest rates, fines), which has minimal oversight and is not subject to the constitutional restrictions that limit state actions (Johnson and Stevens 2013; Johnson and Warchol 2003).

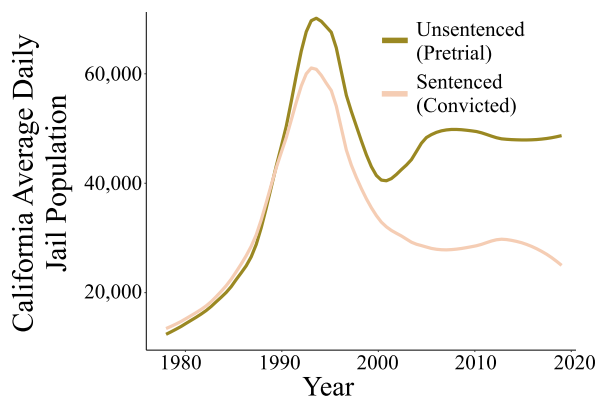


Figure 1: Author calculations from Board of State and Community Corrections (Board of State and Community Corrections 2019) and Bureau of Justice Statistics (State Court Processing Statistics 2009) data.

Pretrial detention detracts from public health and public safety. Imprisonment for as few as three days increases the chance of conviction and future arrest for different crimes (Lowenkamp, VanNostrand, and Holsinger 2013a), especially in individuals suffering from mental illnesses and addictions (Kouyoumdjian et al. 2015; Deitch, Koutsenok, and Ruiz 2000; Prendergast et al. 2004; Caspar and Joukov 2020; Leutwyler, Hubbard, and Zahnd 2017). Detainees awaiting trial face damaging consequences, including loss of employment, schooling, housing, custody of their children, and access to medical care (Rabuy and Kopf 2016; Appleman 2016; Holland-Stergar et al. 2017; Comfort 2016; Stevenson and Mayson 2017). For example, the Medicaid Inmate Exclusion Policy lacks automated reinstatement of Medicaid following release and creates gaps in healthcare

coverage that amplify health, social, and financial burdens associated with recidivism (Albertson et al. 2020). Studies suggest that local jails, where most pretrial detainees are held, cause greater negative health outcomes than prisons because they are typically less equipped to provide medical services (Toman, Cochran, and Cochran 2018; Yi, Turney, and Wildeman 2017; Caspar and Joukov 2020). These issues are compounded by the COVID-19 pandemic, as the rate of COVID-19 cases in jails is 5.5x higher than the U.S. population (Saloner et al. 2020).

Pretrial detention also costs California nearly \$30 billion per year (Amatya et al. 2017) and increases the severity of sentencing and the likelihood of incarceration, recidivism, and conviction (Dobbie, Goldin, and Yang 2018; Gupta, Hansman, and Frenchman 2016; Lowenkamp, VanNostrand, and Holsinger 2013b; Phillips 2012; Ottone and Scott-Hayward 2018; Heaton, Mayson, and Stevenson 2017; Stevenson 2018b; Lowenkamp, VanNostrand, and Holsinger 2013a; Lum, Ma, and Baiocchi 2017). A detainee is 3-4 times more likely to be sentenced than someone released on bail for the same crime (Lowenkamp, VanNostrand, and Holsinger 2013b), partly because of incentivization to take plea deals to negotiate release (Dobbie, Goldin, and Yang 2018; Ottone and Scott-Hayward 2018; Stevenson 2018b; Heaton, Mayson, and Stevenson 2017). California spent \$37.5 million in just six counties from 2014-2015 detaining people whose cases were never filed or were dismissed (*Not in it for Justice: How California's Pretrial Detention and Bail System Unfairly Punishes Poor People* 2017).

Meanwhile, evidence suggests that increasing pretrial release does not increase court absences or criminal activity while awaiting trial (Pretrial Justice Institute 2009; Ouss and Stevenson 2020; Grant 2019; Office of the Chief Judge 2019; Philadelphia District Attorney's Office 2019; Neal 2019). While the system was designed to balance public safety with the health and equity of those accused, the high rate of pretrial detention has created systemic inefficiencies.

Moreover, support for general bail reform has been growing. A 2018 national survey of 1,400 registered voters showed overwhelming support

for pretrial reform, including increased use of citations instead of arrest (76%) and pretrial services for mental health (89%) and substance use (77%) issues (Pretrial Justice Institute 2018). The monetary bail system has been challenged on local, state, and federal levels, with bipartisan bills calling for reforms (Pretrial Integrity and Safety Act 2017; No Money Bail Act 2017). Additionally, legal actions in many state courts have maintained that unaffordable bail is unconstitutional (Scott-Hayward and Ottone 2018; Sparks 2019; Morgan 2019).

Criminal justice reforms should rely on evidence-based practices that do not compromise public safety, such as greater reliance on pretrial release and restorative diversion and supervision services.

II. Policy options

i. Option 1: Support SB 10 (Vote “Yes” to Proposition 25)

SB 10 eliminates monetary bail and adopts “preventive detention” that uses actuarial risk assessment tools to classify defendants into low, medium, and high risk. Those of “low risk” can be immediately released. Otherwise, release versus detainment is determined by local standards and the discretion of judges, prosecutors, county boards of supervisors, and/or pretrial officials. While SB 10 was enacted in 2018, implementation of the legislation was suspended by a veto referendum (Referendum 1856) that will be on the November 2020 ballot as Proposition 25.

Advantages

SB 10 would eliminate cash bail, a system contingent on financial capacity that is socioeconomically and racially discriminatory (Gelbach and Bushway 2011; Demuth and Steffensmeier 2004; Jones 2013). Even low bail levels drive incarceration, as median bail remains larger than the savings of a typical American household (Liu, Nunn, and Shambaugh 2018). In California, a 31% reduction in bail would only help 4% of offenders, and even a 90% decrease puts average bail at \$5,000, still unaffordable for many (Tafoya 2013). The commercial bail industry is especially harmful towards low-income defendants who can become forced into a cycle of poverty and incarceration (Appleman 2016;

Holland-Stergar et al. 2017; Rabuy and Kopf 2016; Johnson and Stevens 2013; Johnson and Warchol 2003). Additionally, this wealth-based system predictably discriminates based on race (Gelbach and Bushway 2011; Demuth and Steffensmeier 2004; Jones 2013). Court officials have broad discretion in decision-making and the likelihood of pretrial release and bail amount is alarmingly arbitrary across judges and locations (Ottone and Scott-Hayward 2018; Barry-Jester 2018; Sheriff’s Justice Institute 2016; Hood and Schneider 2019). In theory, actuarial risk assessment tools are more objective and less subject to racial bias.

Disadvantages

Evidence suggests that replacing cash bail with actuarial risk assessment tools, as proposed by SB 10, is insufficient to promote pretrial release and decrease incarceration and may maintain or increase incarceration rates (Stevenson and Doleac 2019; Stevenson 2018a; Stevenson and Slobogin 2018; Ouss and Stevenson 2020; Starr 2014; Dressel and Farid 2018). Arrests for violent crime while on pretrial release are rare and difficult to statistically predict (Hart and Cooke 2013). Actuarial risk assessments use tail risk models that have low explanatory/predictive power and trend towards overestimations (Angwin et al. 2016; Hart and Cooke 2013). They also have broad and imprecise definitions of risk (Barabas et al. 2019; Starr 2014; Gouldin 2018, 2016) (i.e., including minor offenses like missed court payments, conflating risk of danger and flight, and conflating risk of criminal behavior with risk of arrest). Even with the exclusion of race as a variable, their algorithms rely on demographic and socioeconomic variables highly correlated with race (Starr 2014; Angwin et al. 2016; Stevenson 2018a; Picard et al. 2019). The models also incorporate criminal history data that overrepresents criminality of non-white defendants, who are more likely to be arrested, prosecuted, and convicted for the same conduct as their white counterparts (Mitchell and Caudy 2015; Weaver, Papachristos, and Zanger-Tishler 2019; Rehavi and Starr 2014; Anwar, Bayer, and Hjalmarsson 2012; Abrams, Bertrand, and Mullainathan 2012; Angwin et al. 2016; Stevenson 2018a; Picard et al. 2019). Moreover, SB 10 does not require judicial adherence to such tools, nor

does it specify which actuarial tool will be employed. Such tools are often proprietary and lack transparency (Barabas et al. 2019; Clayton 2018; Stevenson and Slobogin 2018). Thus, current risk assessment tools are unlikely to decrease pretrial incarceration; in many regions that have adopted such tools, rates of incarceration have either remained constant or have increased (Stevenson 2018a; Stevenson and Doleac 2019; Stevenson and Slobogin 2018; Ouss and Stevenson 2020; Starr 2014; Dressel and Farid 2018). Without lowering pretrial incarceration, a decrease in spending on incarceration is not anticipated.

ii. Option 2: Oppose SB 10 (Vote “No” to Proposition 25)

Voting “No” to Proposition 25 will prevent SB 10 from being passed and result in no change to the current monetary bail system.

Advantages

Analyses of SB 10 reveal that it is unlikely to decrease pretrial detention and will exacerbate racial inequalities perpetuated by the current cash bail system (Stevenson and Doleac 2019; Stevenson 2018a; Stevenson and Slobogin 2018; Ouss and Stevenson 2020; Starr 2014; Dressel and Farid 2018). An ineffective law can serve as a roadblock to reform by taking up limited resources, creating a false sense of progress, and delaying the introduction of reparative legislation. Racial and socioeconomic marginalization and oppression by the cash bail system would persist.

Disadvantages

Maintaining the current system is damaging to individuals, expensive, and dangerous to public safety and health. A large number of pretrial detainees face severe physical and mental health issues (Yi, Turney, and Wildeman 2017; Human Impact Partners 2020; Stevenson 2018b; Stevenson and Mayson 2017; Comfort 2016). These harms burden low-income and nonwhite individuals the most (Appleman 2016; Holland-Stergar et al. 2017; Rabuy and Kopf 2016; Gelbach and Bushway 2011; Demuth and Steffensmeier 2004; Jones 2013). Pretrial detainment is also expensive; in Santa Clara County, each person costs \$15 per day if released, as opposed to \$204 per day

if detained (County of Santa Clara Bail and Release Work Group 2016).

Option 3: Oppose SB 10 (Vote “No” to Proposition 25) and introduce new legislation

A new bill should be introduced that shifts the focus from detainment to release for misdemeanor/nonviolent defendants. Prior to arraignment, law enforcement and pretrial officers can be given the discretion to release people through citations and diversion programs, which are effective (Ochoa et al. 2019) but underused (Holliday et al. 2020) in places like Los Angeles County. Diversion programs address individual needs like homelessness, addiction, and mental illness by redirecting defendants to the relevant medical and community-based professionals. After meeting court-specified requirements, charges may be dropped and jail time avoided. Decisions about pretrial detainment versus release should be modeled after successful bail reform in other states such as New Jersey (Shalom et al. 2016). Most misdemeanors/nonviolent defenders should be released, either on their own recognizance or in tandem with supervision and pretrial services.

Actuarial risk assessment tools should be designed to aid, not replace, judges in their decision making. These tools can be improved by the use of transparent and uncomplicated models (Zeng, Ustun, and Rudin 2017; Dressel and Farid 2018) and by excluding discriminatory variables that are unproductive of recidivism, such as socioeconomic status of family of origin (Gendreau, Little, and Goggin 1996). Models can also be trained on local races/ethnicities to increase accuracy and equity (Gasek 2019; Clayton 2018; Mamalian 2011). Non-invasive supervision and restorative/community-oriented pretrial services, like counseling and skills training, can be provided by agencies independent from the court and probation departments (National Association of Pretrial Services Agencies 2004).

Advantages

Increasing pretrial release does not result in more court absences, violent crimes, or arrests (Pretrial Justice Institute 2009; Ouss and Stevenson 2020; Grant 2019; Office of the Chief Judge 2019; Philadelphia District Attorney’s Office 2019; Neal 2019). Reduced misdemeanor arrests and

increased flexibility for pretrial officers to divert arrests will decrease the burden placed on judges and increases equity (Harris, Goss, and Gumbs 2019; Weaver, Papachristos, and Zanger-Tishler 2019). Diversion programs restore treatment of mental illness and substance abuse to medical professionals, reducing the burden on the criminal justice system and promoting behavioral change. Bail reforms with mandatory release on recognizance in other states have been largely successful (Grant 2019). Studies suggest that common interventions prioritizing discipline and surveillance are ineffective (MacKenzie and Farrington 2015; Bechtel et al. 2017), can elevate incarceration rates through technical violations (Turner, Petersilia, and Deschenes 1992; Hyatt and Barnes 2017), and cause financial strain (i.e., mandatory courses that impede employment, expensive ankle monitors) (Doyle, Bains, and Hopkins 2019).

The emphasis should be placed on restorative, community-based interventions shown to be effective and typically more cost-effective (MacKenzie and Farrington 2015; Bechtel et al. 2017; Barnes et al. 2010; County of Santa Clara Bail and Release Work Group 2016; Gasek 2019; Cooke et al. 2018). For example, behavioral nudges, such as text message reminders and transportation to court appearances, effectively and relatively inexpensively increase court appearances (Cooke et al. 2018; Rosenbaum et al. 2011; Schnacke, Jones, and Wilderman 2012; White 2006; Pretrial Justice Institute 2012). Improving pretrial services is projected to create thousands of new jobs and the cost is significantly outweighed by the billions of dollars California would save annually by decreasing pretrial detention (in 2014, an estimated \$10 billion with a pretrial detainment rate of 40%, and \$20 billion at 10%)(Amatya et al. 2017).

Disadvantages

Such a bill is currently not in place and would take time to develop. Reform efforts could be harmed by a violent crime being committed by an individual awaiting trial.

IV. Policy recommendation

We recommend *Option 3: Oppose SB 10 (Vote “No” on Proposition 25) and introduce new legislation.* Monetary bail is an ineffective and inefficient public safety measure, but there is converging evidence that SB 10 inadequately addresses the underlying issue of pretrial detention by relying too heavily on actuarial risk assessment tools. These tools are projected to perpetuate racial and socioeconomic discrimination (Angwin et al. 2016; Picard et al. 2019; Starr 2014; Stevenson and Doleac 2019; Stevenson 2018a; Stevenson and Slobogin 2018; Ouss and Stevenson 2020; Dressel and Farid 2018). For those accused of misdemeanor/nonviolent crimes, the standard should be mandatory pretrial release in conjunction with restorative, community-based interventions, already shown to be effective and cost-effective (MacKenzie and Farrington 2015; Bechtel et al. 2017; Barnes et al. 2010; County of Santa Clara Bail and Release Work Group 2016; Gasek 2019).

For instance, in California’s Santa Clara County, which has shifted to community-sponsored release, defendants can choose community organizations like churches to run their pretrial services. 95% of released defendants appear for court dates and only 1% are re-arrested while awaiting trial (County of Santa Clara Bail and Release Work Group 2016). These rates are comparable to those of other regions with bail reforms (Pretrial Justice Institute 2009; Ouss and Stevenson 2020; Grant 2019; Stevenson 2018a; Stevenson and Mayson 2017; Office of the Chief Judge 2019; Philadelphia District Attorney’s Office 2019; Neal 2019).

We further recommend that policy emphasize longitudinal assessment, stakeholder input, and transparency. Data should be regularly collected along the pretrial pipeline for independent assessment. Public reporting mechanisms exist that compare behavior to objective measures and ensure transparency (i.e., public report cards for surgeons [Kolstad 2013]). Investing in randomized control trials can clarify causal effects of pretrial release, supervision, and pretrial services (Greiner and Maréchal). Frequent reports from longitudinal analyses can also help garner public support.

While most Americans believe mass incarceration to be a problem (American Civil Liberties Union 2017; Clarke 2018; Pretrial Justice Institute 2018), bail reform must address the fear that reducing the jail population threatens community safety. Effectively shifting pretrial standards requires public trust and support, and any strategy should highlight safety statistics from jurisdictions that have successfully implemented reforms without a significant rise in violent crimes or court absences (Pretrial Justice Institute 2009; Ouss and Stevenson 2020; Grant 2019; Stevenson 2018a;

Stevenson and Mayson 2017; Office of the Chief Judge 2019; Philadelphia District Attorney's Office 2019; Neal 2019). Transparency and education for the public and relevant actors, including judges and probation officials, may help ease the transition away from detention, build trust in justice and law enforcement agencies, and result in better public health and justice outcomes. Shifting towards release instead of detainment is the only option that ensures equitable treatment and mitigates the health detriments of detainment.

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