Ending cash bail: How to save money while mitigating socioeconomic & racial disparities

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Summary
Cash bail policies should be eliminated to end the incarceration of people presumed innocent. Ending these policies will also save money and mitigate socioeconomic and racial disparities. Instead of replacing cash bail with risk assessment tools and preventive detention, personal recognizance should be the preferred solution. Savings from decreased incarceration should then be reinvested in communities to address the root causes of incarceration.

Background
Innocent until proven guilty. When a person is arrested and charged with a crime, they either await trial in jail or in the community. Under US law, people are presumed innocent until proven guilty. Therefore, the legal purpose of pretrial detention is to ensure that the defendant attends their court dates.

What is bail? The purpose of bail is to ensure that people who await trial in the community come to court to resolve their cases. In most jurisdictions bail is not a right and can be denied in certain circumstances; but when set, it can take multiple forms, including personal recognizance and cash bail. Personal recognizance is a form of bail where defendants await trial in the community on their word that they promise to come to court when scheduled.

Cash bail lets people buy their freedom. Cash bail is an upfront cash payment made to the court to gain freedom while awaiting trial, a form of collateral that a person would lose if they fail to appear for their scheduled court dates. After the case is resolved, the cash is returned to the person who paid it. When cash bail is set, people who cannot pay go to jail, while those who can go free.

Bail policies vary by state. While most US states continue to use cash bail in most cases, there remain several factors which vary. This brief broadly considers the general consequences and potential alternatives to the use of cash bail without delving into the separate, but also important, nuances in state level cash bail policies.

The Problem With Cash Bail
Cash bail does not reduce flight risk. The use of cash bail assumes that that people regularly flee the country to avoid prosecution; however, there is little evidence that this is true. For example, only 3 percent of released felony defendants in the 75 largest US counties (i.e., those individuals with the most serious arrest charges) missed a court appearance and remained a fugitive. While another 13 percent of these individuals missed a court date, many ultimately returned to court [1]. The use of cash bail also assumes that people accused of crimes are more motivated by the potential loss of their money rather than other factors, such as clearing their name.

Cash bail disrupts lives by leading to pretrial detention. Even though the US judicial system is founded on the principal that all are innocent until proven guilty, people who are unable to afford their cash bail are incarcerated. During their incarceration, social ties are broken and access to resources to fight their cases are limited. Additionally, caregiving activities and other community engagement, including work, is lost, leading to additional community harm. Incarceration also leads to worse health for prisoners [2, 3] and their children. Finally, local jails are often overcrowded. Adding another class of incarcerated people who have not been found guilty of an offense only exacerbates that problem.

Cash bail leads to more guilty pleas and longer sentences. Research dating back to the 1930s has demonstrated a relationship between pretrial incarceration and the severity of
case outcome. More severe case outcomes can include a higher likelihood of being found guilty or a harsher sentence, such as being sent to prison instead of probation or being sentenced to more time in prison. Part of the reason for these outcomes is that most US cases are resolved through plea bargaining, rather than a jury trial. People incarcerated pretrial are more likely to plead guilty as compared to their counterparts living in the community [4]. This occurs because the pretrial process can be very lengthy, lasting months or even years. As time passes people in jail become more desperate to leave and more willing to take a plea bargain, even if it results in a harsher outcome than they would likely have received at a jury trial. People awaiting trial in the community do not face the same pressure to accept a plea bargain. In contrast, these people’s cases are more likely to be dismissed [5].

Cash bail exacerbates economic and racial disparities [6]. Of people incarcerated pretrial, 34 percent are held because they are unable to afford their bail [7]. The result of this economic disparity is that people with money can buy their pretrial freedom, stay connected to their families and have a better chance or avoiding prison altogether. These economic disparities are compounded when a person is also Black or Hispanic. The odds of conviction and a subsequent penalty of incarceration, due to lack of ability to pay cash bail, are nearly twice as high for Black or Hispanic people, as compared to White people [8]. This structural oppression works to impact low income Black and Hispanic people even more harshly than low income White people.

Cash bail is expensive. Taxpayers fund the additional expenses related to increased incarceration resulting from cash bail. It is estimated that the costs incurred by taxpayers to fund pretrial incarceration are $13.6 billion annually [9]. However, this figure does not account for the costs incurred by other state agencies to support families after the loss from a member’s incarceration. A study of federal prisoners, which did take such costs into account, estimated that the average cost to the public per day of pretrial incarceration is $135 per person [10]. Adding in these costs brings the total annual costs of pretrial detention to over $62 million per day, which is almost twice as high as the cost of incarceration alone. Tax revenue is also lost while individuals are incarcerated, as they are unable to participate in the labor market [11].

Preventive Detention: A New Problem In Pretrial Detention
Preventive detention does not replace eliminating cash bail. Risk assessment guided preventive detention has become one of the most popular replacements for cash bail. However, risk assessment tools have been criticized for overstating their predictive ability and perpetuating racial and economic bias [12-15]. Risk assessment tools are algorithms which aim to predict a person’s risk of flight, and/or dangerousness, based on historical variables. People classified as high risk are incarcerated to prevent their flight and/or future crime; people classified as low risk are released without cash bail, [16] but are often electronically monitored and/or required to meet other conditions such as drug testing. Critiques of these approaches suggest that the elimination of cash bail and replacement with preventive detention guided by risk assessment tools could lead to increased pretrial detention, particularly for Black, Hispanic and low-income defendants [17].

Risk assessment tools exacerbate racial and economic disparities, as many of the factors on which they rely (such as neighborhood) are correlated with race and poverty [16]. Additionally, there is little evidence that preventive detention reduces crime in the long run, as nearly all people who are incarcerated are eventually released, and incarceration itself can make a person more likely to be re-arrested [18]. The experience of incarceration is also harmful, as it can lead to victimization, new legal charges and worse health. Implementation of risk assessment tools, pretrial monitoring and preventive incarceration are also often very costly as they have historically been paired with creation of a new pretrial division of a probation system. Promises of diverting savings from reduced incarceration to create this division has not proven to be enough to cover the costs in New Jersey, where this strategy was adopted [19]. In sum, risk assessment tools and preventive incarceration exasperate existing problems and potentially create more problems than they solve.
Policy Recommendation

Cash bail can and should be eliminated. Given cash bail’s documented harms and lack of usefulness, it should be eliminated. Money should no longer stand between a person and their freedom. Moreover, using money as collateral for freedom does not protect the public. Some states have already reduced or eliminated cash bail, for at least some defendants, including Kentucky (2011), Colorado (2013), New Mexico (2016), Alaska (2016), New Jersey (2017) and California (2018). This demonstrates that there is political will and momentum to make this change. Given recent implementation of these policies outcomes have not been thoroughly studied, although projections for Alaska suggest that the number of people held pretrial will decrease[20]. Preliminary data from New Jersey also found a decrease in the number of people detained[21], without an overall increase in crime [22]. However, the disparate impact of the policy across racial and economic groups has not been examined.

Personal recognizance should be the default type of bail. There is evidence that people are motivated to appear in court by intrinsic factors rather than the external risk of losing cash bail. Outcomes from community bail funds indicate that about 95 percent of people return to court [23]. Community bail funds post cash bail for strangers, typically without attaching any other requirements. Unlike bail bondsmen, these groups are not motivated by profits and do not act as bounty hunters in the event that someone whose bail they posted does not appear in court [24]. When community bail funds pay bail for someone, it is the bail fund that will lose money if a person does not go to court. Given that nearly all bail fund clients return to court, without the threat of losing cash, cash bail policies are likely not needed.

Policies need to address economic and racial disparities in pretrial incarceration. Given that cash bail primarily harms the poor, and marginalized racial and ethnic groups, changes to bail policies should incorporate plans to monitor the impact on these groups to ensure that they are not further disenfranchised. For example, applying conditions of release that include having a permanent residence could prevent those who are homeless from qualifying for release. By collecting disaggregated data on who continues to be incarcerated pretrial, after policy changes, states can learn if their policies have actually solved the problems with cash bail or if they have created new ones.

Savings from reduced spending on incarceration should be reinvested in communities. Transferring savings from reductions in spending on incarceration to community organizations can strengthen communities and provide services to individuals who might otherwise be at risk of incarceration. Community organizations focus on the root causes of incarceration, rather than on continued surveillance. Funds could be transferred via a competitive grant process through relevant state agencies, for example housing, health or economic development departments. This process would allow for controlled spending and a direct investment in the communities where it is most needed. Additionally, it would allow for services to be delivered by community partners rather than the adversarial or punishment-based court and prison systems. This approach is strengths based and would address incarceration through increasing opportunity rather than incapacitation.

References