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POLICY BRIEF 2019-05

Proposals for Improving the U.S. Pretrial System

MARCH 2019



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Proposals for Improving the U.S. Pretrial System

On any given day, there are more than half a million individuals in custody awaiting trial in the United States. An estimated 65 percent of all U.S. inmates in jails (i.e., local and county facilities for those with relatively short sentences) are awaiting court action on a current charge, and approximately 20 percent of the jail and prison populations nationwide (including state and federal inmates) are made up of individuals awaiting trials. An important practice underlying high pretrial detention rates is the use of cash bail: in New York City, for example, 46 percent of misdemeanor defendants and 30 percent of felony defendants were detained because they were unable to (or chose not to) post bail of less than \$500. These high rates of pretrial detention have contributed to concerns regarding the effectiveness and constitutionality of the current bail system.

Critics argue that excessive bail conditions and pretrial detention can disrupt defendants' lives by putting their jobs, housing, and child custody at risk; can increase the pressure on defendants to accept unfavorable plea bargains, which can increase the risk of wrongful conviction; and can exacerbate socioeconomic disparities. Conversely, proponents claim that the bail system is operating as designed, and that releasing more defendants would increase pretrial flight and endanger public safety.

A new Hamilton Project policy proposal by Will Dobbie and Crystal Yang provides an overview of the goals of the pretrial

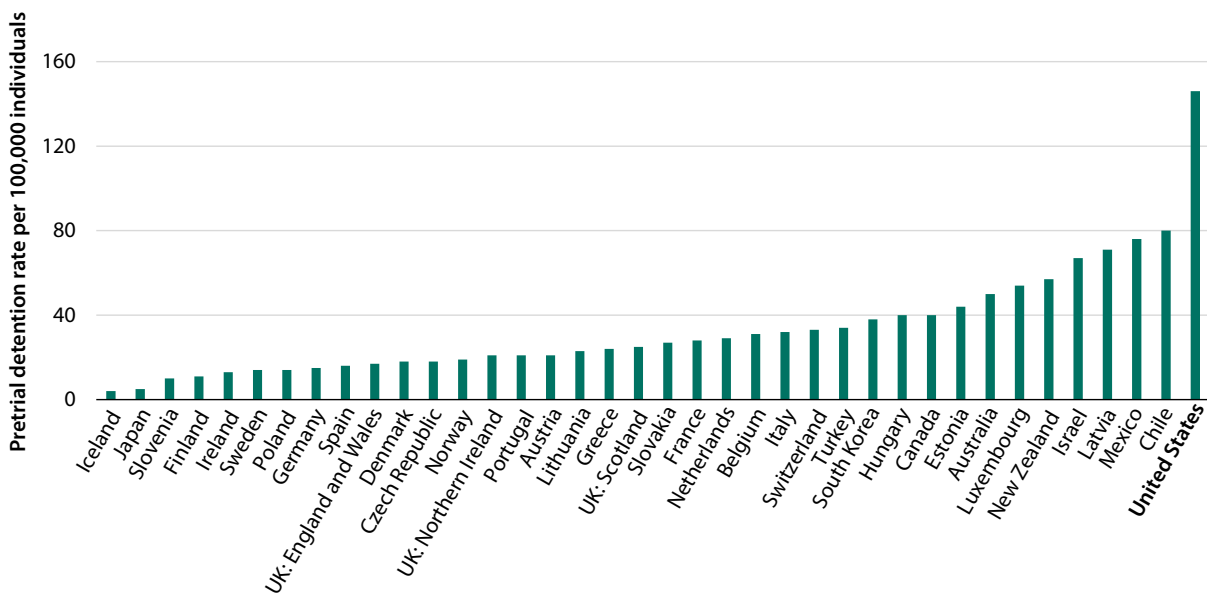
system and how it operates in practice today. Informed by the available evidence, the authors propose two sets of policy proposals. The first set—to use behavioral nudges to decrease pretrial violations and to change the default away from pretrial detention for low-risk defendants, relying less on cash bail and more on release on recognizance and nondetention policies—is supported by enough evidence to justify immediate nationwide implementation. The second set—to improve the pretrial decision-making process through judge decision-aids and to provide additional information on judge performance to both judges and the public—is supported by enough evidence to justify pilot testing, with widespread implementation to follow if successful.

The Challenge

The United States leads all other countries with roughly half a million detainees on any given day, nearly twice as many as any other OECD country on a per capita basis (see figure 1).

Dobbie and Yang explain that the high rate of pretrial detention in the United States in recent years is largely due to the increasing use of monetary or cash bail—which makes a defendant's release conditional on a financial payment—and the corresponding decreasing use of release without bail (requiring only one's promise to return to court). In the set of 40 populous U.S. counties where detailed data are available, the share of defendants assigned monetary bail exceeded 40 percent in 2009, an 11-percentage-point increase from 1990 (see figure 2). The fraction of defendants released on recognizance decreased by about 13 percentage points

FIGURE 1.
Pretrial Detention Rates in OECD Countries



Source: Walmsley 2016.

Note: Pretrial detention rates include all individuals who are deprived of liberty following a judicial or other legal process but who have not been sentenced by a court for an offense. In almost all cases, the original data come from either the national prison administration of the country concerned or the ministry responsible for the prison administration. The estimate for the United States excludes prison populations in overseas territories. The pretrial population rate for the Netherlands is based on data from 2013. The estimates for all other countries use data from 2014, 2015, or 2016. See Walmsley (2016) for additional details on the data and variable definitions.



over the same period in these counties. The percent held without bail was effectively constant.

Dobbie and Yang explain that the widespread use of monetary bail directly leads to high pretrial detention rates in most jurisdictions because many defendants are unable or unwilling to pay even relatively small monetary bail amounts. In New York City, for example, an estimated 46 percent of all misdemeanor defendants and 30 percent of all felony defendants were detained prior to trial in 2013 because they were unable or unwilling to post bail set at \$500 or less.

Pretrial detention and cash bail policies must balance the costs of detention, including harms to detainees, with the benefits of reducing pretrial crime and failures to appear in court. But the high rate of pretrial detention has contributed to several concerns. First, excessive bail conditions and pretrial detention can disrupt defendants' lives, putting jobs, housing, and child custody at risk. Many jurisdictions set bail without an adequate consideration of, and tailoring to, the defendant's ability to pay; as a result, pretrial detention may be determined by a defendant's wealth, not by their risk to the community. Second, critics argue that pretrial detention increases the pressure for defendants to accept unfavorable plea bargains, which can increase the risk of wrongful conviction. Third, there are significant disparities in bail conditions and pretrial detention rates across seemingly identical defendants, both across and within jurisdictions. For example, after adjusting for defendant characteristics, counties such as Harris County in Texas and Orange County in California detain 48 to 53 percent more defendants, respectively, than counties such as Middlesex County in New Jersey and Kings County in New York.

BOX 1.

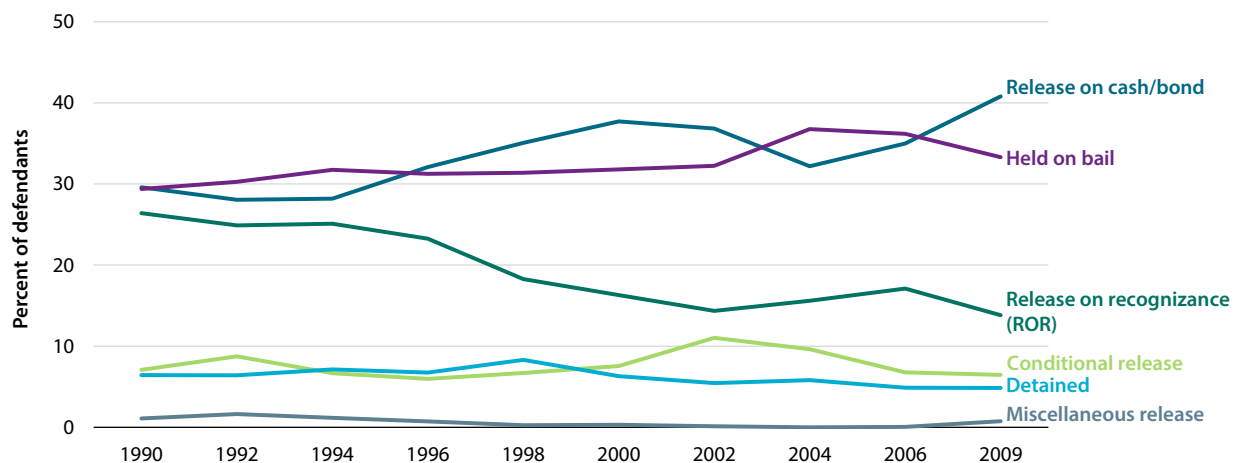
Pretrial Options for Defendants

Based on their assessment of risk, bail judges typically have several options in setting conditions for release, which can include:

- **Release on recognizance:** In cases where a defendant poses a sufficiently low risk of flight or danger, a judge may simply release the defendant after the defendant promises to return for all court proceedings.
- **Conditional release:** A judge can release defendants subject to certain nonmonetary conditions (ranging from pretrial services to drug treatment to electronic monitoring) when they determine that those conditions are necessary to prevent flight or harm to the public.
- **Monetary bail:** A judge can require a defendant to place a deposit in cash in exchange for release. Those who do not have the required deposit in cash can borrow this amount from commercial bail bondsmen, who charge a nonrefundable fee—typically 10 percent of the bail amount—for their services.
- **Denial of bail:** For the most serious crimes, the judge may require that the defendant be detained pending trial by denying bail altogether, although outright detention is uncommon in practice.

FIGURE 2.

Share of Defendants with Various Pretrial Outcomes, 1990–2009



Source: Bureau of Justice Statistics (BJS) 1990–2009; authors' calculations.

Note: Data are from the 40 largest counties in the United States. "Release on Cash/Bond" includes defendants who were released under some monetary conditions such as a surety bond, a full cash bond, a deposit bond, a property bond, an unsecured bond, or a combination of conditional release and surety bond. "Held on Bail" includes defendants who were assigned bail, but who did not post it and were consequently detained. "ROR," or release on recognizance, includes defendants who were released on the promise to return to court for their next scheduled hearing, with no financial liability if they fail to appear. "Conditional Release" includes defendants who were released under conditions such as monitoring or supervision. "Detained" includes defendants who were denied bail or held under another charge or for other reasons. "Miscellaneous Release" includes defendants who were released in response to a court order placing limits on a jail's population or under a type of release other than the specified above.



Costs of the Current Pretrial System

The authors describe the negative consequences for individuals of excessive bail and pretrial detention. It is important to note that judges rarely detain individuals outright before trial, meaning that the effects of pretrial detention are largely the effects of using cash bail. The authors group these effects into three broad categories: effects on (1) case outcomes, (2) pretrial flight and both pre- and posttrial crime, and (3) posttrial economic outcomes. A series of recent papers have provided credible evidence in each of these areas using large-scale administrative data on criminal defendants. This new research estimates the effects of pretrial detention/release using the quasi-random assignment of defendants to bail judges who vary in the leniency of their bail decisions.

Case Outcomes

Pretrial detention of just three days increases the probability of a defendant being found guilty by 14.0 percentage points relative to defendants who are not detained before trial, with larger effects for defendants with no prior offenses in the preceding year. The increase in conviction is largely driven by a higher probability of the defendant pleading guilty, which increases by 10.8 percentage points with pretrial detention. The authors interpret these results to suggest that initial pretrial detention affects case outcomes at the margin largely by weakening defendants' bargaining positions before trial.

Flight and Crime

According to Dobbie and Yang, pretrial detention does help to ensure that defendants appear in court, decreasing the probability of failing to appear by 15.6 percentage points. Similarly, pretrial detention decreases the likelihood of rearrest prior to the adjudication of the initial case by 18.9 percentage points because it is more difficult for an individual to re-offend while in custody. At the same time, pretrial detention increases the likelihood of rearrest following case disposition by 12.1 percentage points. The authors find no detectable effect of initial pretrial detention on overall new crime when aggregating both pretrial and posttrial outcomes, suggesting that the crime-causing effects and the incapacitation effects roughly offset one another.

Economic Outcomes

Research conducted by the authors and others shows that pretrial detention decreases attachment to the formal labor market. Initial pretrial detention of just three days decreases the probability of employment in the formal labor market three to four years after the bail hearing by 9.4 percentage points. This effect occurs largely through the increased probability of having a criminal conviction on one's record.

Unfairness and Inefficiency in the Current U.S. Pretrial System

In addition to the intrinsic desirability of a fair system, the authors point out that fairness has implications for efficiency: a bail system that inconsistently treats otherwise similar offenders generates inefficient differences in the amounts of deterrence and incapacitation achieved. And these inefficiencies are potentially

Roadmap

For immediate implementation, courts and state legislatures will do the following:

- Build in programming to provide behavioral nudges, such as text messages or redesigned summons forms, to defendants released pretrial.
- Shift the default away from cash bail and pretrial detention and toward citations and release on recognizance for lower-risk defendants.
- Shift the default away from pretrial detention and toward less-restrictive pretrial alternatives, such as enhanced pretrial services, for higher-risk defendants.

For local pilot testing and subsequent implementation upon success, policymakers and researchers will do the following:

- Use and evaluate pretrial risk assessment tools, whether they be internally developed or ones such as the Laura and John Arnold Foundation Public Safety Assessment.
- Provide systematic feedback to judges that report pretrial outcomes across a variety of dimensions for defendants assigned to them.
- Publish public report cards for judges to encourage accountability and allow for more accurate comparisons between judges.
- Implement the use of judge decision-aids, such as judicial bench cards, to encourage more intentional decision-making.

large: moving from the most-lenient to the least-lenient judge increases the probability of receiving monetary bail by 52 percent.

The unequal treatment of otherwise identical black and white defendants is also a serious concern in the pretrial system. Judges are 3.6 percentage points more likely to assign monetary bail to black defendants than white defendants; conditional on being assigned monetary bail, black defendants receive bail amounts that are \$9,923 greater, even after controlling for observable case and defendant characteristics. Among felony defendants in large U.S. counties, black defendants are 9 percentage points more likely to be detained pretrial compared to otherwise similar white defendants.

A New Approach

Based on the review of this evidence, the authors find that there are economically large costs of pretrial detention—and, by extension, the use of cash bail. These costs come largely in the form of significant collateral consequences of having a criminal conviction on labor market outcomes as well as the administrative costs of pretrial detention. In contrast, there are relatively small

benefits to pretrial detention due to the low costs of apprehending defendants who fail to appear in court. Moreover, the current pretrial system contributes to inequalities and inefficiencies in the criminal justice system. Taking these considerations into account, the authors conclude that courts should detain far fewer individuals before trial than is currently the case.

The authors propose two sets of policies that can reduce the use of cash bail and pretrial detention and improve pretrial release decisions more generally. The first set is supported by enough evidence to justify immediate nationwide implementation:

- Make more use of behavioral nudges for defendants.
- For low-risk defendants, replace bail with citations and release on recognizance.
- For higher-risk defendants, replace bail with noncash and nondetention alternatives.

The second set is supported by enough evidence to justify pilot testing, with widespread implementation to follow if successful:

- Make more use of risk-assessment tools.
- Provide judges with more feedback.
- Produce public report cards that evaluate judges.
- Make decision-aids available to judges.

Proposals for Immediate Implementation

Make More Use of Behavioral Nudges for Defendants.

The authors base their proposal on the evidence that inexpensive behavioral nudges like text message reminders can significantly reduce failure-to-appear rates without the need for pretrial detention, leading to substantial social benefits at virtually no cost to the public.

Recent research in New York City examined the role of the summons form, in addition to text message reminders. The researchers redesigned the summons form to draw more attention to the actions required of the defendant, the time and

place of the next court appearance, and the consequences of missing a court appearance. They concluded that more than 30,000 new bench warrants could be avoided in New York City alone if the new summons form and the text message reminders were implemented across the city.

For Low-Risk Defendants, Replace Bail with Citations and Release on Recognizance.

The authors demonstrate that pretrial detention generates large net costs to defendants and society, and find that by comparison there are minimal costs of shifting the default pretrial action for low-risk detainees toward citations and release on recognizance.

The authors point out that the total net cost of pretrial detention for three or more days is between \$55,143 and \$99,124 for the marginal defendant in Miami-Dade and Philadelphia, with even higher net costs for low-risk defendants. Intuitively, additional pretrial detention has significant long-term costs associated with the effect of having a criminal conviction on economic outcomes, the crime-causing effect of detention, and the administrative cost to taxpayers of jailing defendants.

One straightforward way to decrease the net costs of pretrial detention is to move away from money bail and pretrial detention and toward citations and release on recognizance, much as New Jersey did in 2017 when voters approved amendments to the state constitution that would reduce the use of monetary bail, require the use of risk assessment tools, and expand the use of citations. Since the implementation of these reforms, approximately 70 percent of arrested defendants receive a citation instead of being booked, and the pretrial jail population has fallen by 20 percent. While more research on the New Jersey reform is needed, particularly regarding its effects on pretrial misconduct, these statistics suggest that jurisdictions can successfully reduce their reliance on pretrial detention and money bail.

For Higher-Risk Defendants, Replace Bail with Noncash and Nondetention Alternatives.

For higher-risk defendants as well as low-risk defendants, there is substantial evidence that pretrial detention generates large net costs to defendants and society, and there is at least some evidence that less-restrictive alternatives can accomplish the same criminal justice objectives for this population.

Dobbie and Yang also describe accumulating evidence in support of less-restrictive (and less-expensive) pretrial alternatives such as supervised release, electronic monitoring, and enhanced pretrial services. Electronic monitoring has been found to reduce pretrial misconduct, while pretrial supervision has been shown to increase court appearances. The evidence on the causal effects of providing pretrial services is more limited, but both the District of Columbia and some charitable bail organizations have used these services to seemingly great effect. In the District of Columbia, for example, pretrial misconduct rates are below the national average despite nearly all defendants being released without monetary conditions.

Learn More about This Proposal

This policy brief is based on the Hamilton Project policy proposal, “Proposals for Improving the U.S. Pretrial System,” which was authored by

WILL DOBBIE

Princeton University and National Bureau of Economic Research

CRYSTAL YANG

Harvard Law School and National Bureau of Economic Research

Proposals for Pilot Testing

Make More Use of Risk-Assessment Tools.

Providing judges with risk assessment tools may help them more accurately discern the potential risk of releasing a particular defendant, thereby leading to more-accurate and more-appropriate pretrial detention decisions. The authors discuss research showing that a risk assessment tool based on a machine-learning algorithm could, at least in theory, reduce the pretrial detention rate in New York City from 60.4 to 41.9 percent (holding the pretrial crime rate constant), or reduce the pretrial crime rate from 39.1 to 24.7 percent (holding the jail rate constant), or else some combination of those improvements.

The authors discuss several considerations for providing these tools, recommending that jurisdictions carefully consider whether to develop their own risk assessment tools or use an off-the-shelf tool such as the Laura and John Arnold Foundation Public Safety Assessment. Dobbie and Yang also highlight the importance of tailoring any risk assessment tool to information from its own population so as to maximize the tool's usefulness for predicting defendant outcomes.

Dobbie and Yang emphasize that jurisdictions must regularly monitor pretrial outcomes such as pretrial release rates, pretrial misconduct rates, and socioeconomic and racial disparities in pretrial outcomes to identify any potential problems with either the risk assessment tool itself or the way in which judges are using the risk assessments. In particular, the authors take seriously the concern that these tools may differentially impact white and minority defendants. While the current pretrial system—based on judicial discretion—is also likely to incorporate factors such as education, prior criminal history, and even a defendant's race, it is necessary for policymakers to ensure that risk assessment tools avoid reinforcing historical biases in opportunities and policing.

Provide Judges with More Feedback.

In most jurisdictions there is no systematic feedback provided to judges working in the pretrial system. It can be extremely difficult for judges to learn about their own performance because most jurisdictions do not track pretrial detention rates by judge, among other pretrial metrics. Yet there is growing evidence that learning and experience may mitigate both racial bias and behavioral errors in judicial decision making. Dobbie and Yang therefore propose that jurisdictions provide feedback on pretrial detention and misconduct rates, both overall and by race and gender, to all judges working in the pretrial system.

Produce Public Report Cards that Evaluate Judges.

In addition to providing feedback to judges, the authors propose providing feedback to the public. Evidence suggests that the use of public report cards can improve outcomes in other contexts. For example, there is evidence that public report cards for surgeons increase quality and performance in the health-care system, and that providing school principals with teacher report cards increases teacher quality and test scores in the education system. Similar interventions in bail hearings may lead to improved outcomes by highlighting the highest and lowest performers in

each court and creating pressure for the latter to change their behavior.

Make Decision-Aids Available to Judges.

Decision-aids such as bench cards (i.e., an infographic or fact sheet) can help judges to slow down their thinking and rely less on heuristics and stereotypes, according to the authors. Some research finds that judicial bench cards, when coupled with implicit bias training and participation in listening and discussion groups, led to sustained improvements in child placement in juvenile preliminary protection hearings.

Similar interventions in bail hearings may also lead to improved outcomes and reductions in racial bias and are extremely inexpensive to implement. For example, a pretrial bench card may ask judges to carefully consider the risk of flight and danger to public safety if the defendant were to be released, the range of pretrial options and the least-restrictive alternative, the defendant's ability to pay, and what pretrial conditions were assigned to similar past defendants, both of the same and of different race and gender.

Benefits and Costs

The authors' reforms operate against a backdrop of high economic costs of pretrial detention. Considering the administrative costs of jail, the costs of apprehending individuals who fail to appear to court, the costs of future criminality (both pre- and posttrial), and the economic impact on defendants, the authors estimate that the total net cost of pretrial detention for three or more days for the marginal defendant is between \$55,143 and \$99,124. Intuitively, additional pretrial detention reduces social welfare because of the significant long-term costs associated with having a criminal conviction on economic outcomes, the crime-causing effect of detention that offsets the incapacitation benefit, the administrative cost to taxpayers of jailing defendants, and the relatively low costs associated with apprehending defendants who miss required court appearances.

This cost-benefit analysis also reveals that pretrial detention is likely even more costly on net for certain groups of offenders. The benefits of pretrial detention are relatively small and the costs of detention relatively large for defendants with no recent prior criminal history, suggesting that the net cost of pretrial detention is even larger for this group. The estimated total net cost of pretrial detention is between \$84,782 and \$162,327 for marginal defendants with no recent priors, which is 54 to 64 percent larger than for the full sample of defendants.

In sum, these calculations suggest to the authors that unless there is a large general deterrence effect of widespread use of cash bail and associated high levels of pretrial detention, detaining more individuals is unlikely to have benefits that exceed the costs. These results therefore suggest making more use of alternatives to pretrial detention.

Conclusion

The U.S. pretrial system is designed to balance the rights of defendants to be released prior to trial against the societal goals of ensuring court appearances and public safety, while achieving fairness and consistency for defendants. In practice, however, the current bail system fails to achieve many of these objectives. Will Dobbie and Crystal Yang present evidence on the economically large net costs of pretrial detention—generally stemming from the inability of defendants to post bail—to both individual defendants and society at large.

In light of this evidence, the authors present a suite of policy proposals to provide a blueprint for improving the U.S. pretrial system. Increasing the use of behavioral nudges, citations, and release on recognizance for lower-risk offenders instead of bail or detention, as well as noncash and nondetention alternatives for higher-risk offenders will provide immediate relief to courts and the surrounding communities. Moving forward, improving the pretrial decision-making process through risk assessment tools, judge feedback and public report cards, as well as judge decision-aids will ensure that the pretrial system works as designed. A reformed pretrial system has the potential to substantially increase social welfare while simultaneously ensuring that defendants are treated fairly.

Questions and Concerns

1. Should the cash bail system be eliminated entirely?

While the current research strongly supports limiting the use of cash bail at the margin, existing evidence does not yet support the wholesale elimination of the cash bail system, in part because of the lack of natural experiments where cash bail has been eradicated. But there are potential opportunities to study this question moving forward, given the recent bail reforms in New Jersey and California, among other states. The authors view this research as an important area for future inquiry.

2. Do risk-assessment algorithms introduce bias into bail decision making?

As the authors' paper has helped to document, racial bias in the bail system is a real problem. Risk-assessment tools are not immune to this issue, and there is valid concern

that risk-assessment tools may treat white and minority defendants differently. Risk assessment tools generally do not use information about race, but they do use information that may be correlated with race, such as neighborhood, education, and prior criminal history. By including these factors, risk assessment tools may be inadvertently reinforcing historical biases in opportunities and policing; policymakers will need to be vigilant about this possibility as these tools are used. It is important to note that, based on research on the problems with the status quo, even imperfect risk assessment tools can improve on the current pretrial system based on judicial discretion, which is also likely to incorporate factors such as education and prior criminal history (and even a defendant's race). Risk assessment tools can, at least in theory, generate both efficiency and equity gains, even when using imperfect input data. Future work on this topic will help us understand exactly how different types of risk assessment tools impact white and minority defendants, allowing us to provide more-concrete guidance on how to best increase both efficiency and equity in the pretrial system.

Highlights

In their paper, Will Dobbie of Princeton University and Crystal Yang of Harvard Law School review the empirical evidence documenting the costs, benefits, and distributional consequences of the current pretrial system. They conclude that the current pretrial system contributes to inequalities and inefficiencies in the criminal justice system. In addition, they propose a suite of policy proposals—for both immediate and long-term implementation—to reduce our nation’s reliance on cash bail and pretrial detention while also improving pretrial release decisions more generally.

The Proposal

For immediate implementation:

- **Use behavioral nudges** such as text message reminders or user-friendly summons forms to improve appearance rates for defendants released pretrial.
- **Increase the use of citations and release on recognizance for low-risk defendants.** This entails shifting the default criminal justice approach away from cash bail and pretrial detention.
- **Increase the use of noncash and nondetention alternatives for high-risk defendants.** There should be clear limits as to which offenses are appropriate for pretrial detention. Courts will need to take extra steps to ensure that defendants do not absorb unnecessary financial costs.

For pilot testing and implementation upon success:

- **Use risk assessment tools in pretrial decision-making** while ensuring that these tools are sufficiently transparent.
- **Provide feedback on pretrial detention and misconduct rates to judges** to allow them to learn about the effectiveness and impact of their different decisions.
- **Publish public judicial report cards** to enable accountability and comparability among judges.
- **Use judge decision-aids** such as bench cards that can remind judges to slow down their thinking and to rely less on heuristics and stereotypes.

Benefits

The authors argue that there are economically large costs and significant inequalities attached to pretrial detention and the use of cash bail. They estimate that the total net cost of pretrial detention for three or more days for the marginal defendant is between \$55,143 and \$99,124, with even higher costs for marginal defendants with no prior criminal history. Considering these costs, a reformed pretrial system has the potential to increase social welfare substantially, while also ensuring that defendants are treated fairly.



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