

THIS AIN'T JUSTICE.

10 Pretrial Reforms with Unjust Consequences

More people are recognizing mass incarceration as an injustice.

More people continue to evolve their thinking about what's needed to achieve liberty, equity, and safety.

But more and more systems are doing things that may seem like "reform" but are not.

Following is a list of ten pretrial policies and practices that "ain't justice." *How many do you see in your system?*

1

Expanded use of citations with no court appearance support or case processing reform

The use of citations in the field by law enforcement can reduce custodial arrests and the negative impact of even short jail stays. However, without court date information and reminders in plain language, and attention paid by the courts to the timing and number of required court appearances, people cited may fail to appear, resulting in warrants, potential jail admissions, and higher future "risk" scores.

2

Financial conditions of release — and we're not just talking about secured money bond

Secured money bond results in poverty-driven detention, but it's not the only reason that people have their pretrial liberty denied. When people are required to pay fees for pretrial supervision, electronic monitoring, or other conditions of release, those who don't have money to buy their freedom will remain in jail. Often, these fees are ongoing, so even people who are otherwise successful in the community can have their liberty revoked due to inability to pay fees.

3

Setting unnecessary conditions for those given citations or booked and released from jail

Delegated release authority is an effective policy for preventing unnecessary jail stays before a first appearance hearing. If someone is not likely to be detained by a judge or magistrate, it makes sense that they should not be detained by law enforcement or jail staff. Though this policy is often limited to people accused of non-violent charges, it can allow for — or require — a list of bail conditions that create, once again, an opportunity for technical violations, jail admissions, and higher future "risk" scores.

4

Use of non-financial bail conditions initially, but setting of money bond after violations

Legally, money bond in some form is still an option in every U.S. community. Systems that have moved away from money bond usually focus on non-financial bail conditions at first appearance. However, when someone “fails” in the community, secured money bond is typically back on the table. This is based on the erroneous assumption that a secured financial condition will now be effective — or it is assigned as punishment for failure — and again creates the high potential for wealth-based detention. Secured money bond is not an effective condition of release at any point in the process.

5

Use of non-locally-valid or valid-but-modified assessment tools

If your system is already using a pretrial assessment tool, it must at least be validated and retained in its original form. Pretrial assessment tools can only be considered effective if their predictive ability is validated on the local population. But many communities skip this step and simply adopt a tool that was validated somewhere else — or they modify the questions or scoring of the tool and still call it validated. The tool is then (at best) useless, (at worst) biased, and can contribute to over-conditioning, over-detention, and racial and ethnic impact.

6

No tool? No problem! Courts and communities still need a way to evaluate bail conditions.

No system *must* use a pretrial assessment tool to decarcerate the pretrial detention population. But nearly every U.S. state statute requires courts to consider prior criminal history, appearance, the current charge, and if someone was on supervised release at the time of the current charge. Until we change statutes, we need a way to regulate bail conditioning so that it comports with the “least restrictive” mandate without disparate impact. Inconsistent or excessive conditions can lead to — no surprise here — technical violations, readmission, and increased future “risk” score. Even “decision-making frameworks,” matrices that attempt to guide the setting of bail conditions, are essentially experimental, and have the potential to either drive up over-conditioning or even unconstitutionally recommend detention without full due process. Without some form of documentation, technical violations and failure to appear in court without a new arrest will be viewed as a failure on the part of the accused person, rather than considering it could also have been a failure on the part of the system in setting those conditions to start.

7

Harsh (or hidden) exceptions to “reformed” processes

Major changes to pretrial policies often include exceptions or carve-outs, usually in the name of public safety. Be on the lookout for: delegated release for all people accused of misdemeanors *except* violent charges; a presumption of release *except* for “serious” charges; and unsecured or non-financial bail conditions *until* a technical violation. When these exceptions add up or are used frequently, they undermine the decarceral impact of the initial policy, and open the door for constitutional violations and disparate treatment or impact.

8

A wide, deep, long detention net

Detention before trial should be the carefully limited exception. Most state constitutions significantly restrict the use of preventive detention, if it is allowed at all. Moving away from wealth-based detention has exposed systems' desires or needs to have lawful ways to detain people before trial. Some states have passed constitutional amendments defining a "detention eligibility net." A net should only include serious violent charges, and people whose charges fall within the net have a right to a full adversarial detention hearing on their likelihood of appearing in court without a new charge. If the net is too large, though, or full due process protections are not in place, then excessive preventive detention can simply replace detention by an inability to post a secured money bond.

9

Mitigating racially disparate impact(s) at only one decision point

The pretrial justice system is comprised of a series of decision points, and each plays a role in whether the community is able to reach its pretrial goals and avoid unintended consequences. Policies and practices that effectively mitigate disparities at early decision points, such as arrest and first appearance, can have their impact negated downstream. High pretrial liberty rates for people accused of misdemeanors could reduce racial disparities, but if people of color are assigned more onerous conditions or have their freedom revoked at higher rates, this next point will make the accomplishment of the first moot or even disingenuous.

10

Trying to reduce disparity without learning about racial equity and then examining structural and institutional barriers to it. (We should know, we've been trying it for decades.)

Racially disparate impacts in the criminal justice system are insidious and complex. They persist because they are built into policies and practices and reinforced through the decisions that individuals make every day. There isn't a simple fix, be it a "race-neutral" assessment, implicit bias training, or a community engagement strategy. Advancing equity is difficult work that requires deep personal reflection and education, as well as organizational and systemic change. If people and communities aren't willing to do that work, to commit to the value of racial equity and the practice of looking at things through a racial equity lens, they may actually increase disparities despite a commitment to reform.

Let's make pretrial justice a reality. To learn more about PJI's Racial Equity Transformation and join our efforts to advance fair, safe, and effective pretrial policies and practices that honor and protect all people, please visit us at pretrial.org.